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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-1059

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH COMPANY, AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service, Transmittal Nos. 10989 and 11027	Docket No. 19129

DECISION AND ORDER

(Adopted November 22, 1972; Released November 22, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ISSUING ADDITIONAL VIEWS; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING AND ISSUING STATEMENTS; COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT.

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109-019—72——1

APPEARANCES

On behalf of American Telephone & Telegraph Company and Associated Bell System Companies (AT&T), Messrs. *John F. Preston, Jr.*, *Howard Trienens*, *Harold Cohen*, *Thomas M. Eichenberger*, and *Jules Perlberg;* on behalf of GTE Service Corporation (for General Telephone and Electronics Corp.), Messrs. *John Robert Jones* and *William H. Schneider* (of Power, Jones, Bell & Schneider, Esqs., Columbus, Ohio), *Theodore F. Brophy* and *George E. Shertzer* (of New York, New York), and *William Malone*, Washington, D.C.; on behalf of United Utilities, Inc. and United Telephone System Companies, Messrs. *Lloyd D. Young* and *Warren E. Baker* (of Chadbourne, Parke, Whiteside & Wolff, Esqs., Washington, D.C.); on behalf of Microwave Communications, Inc. (MCI), Messrs. *Kenneth A. Cox*, *Michael H. Bader* and *William J. Byrnes* (of Haley, Bader & Potts, Esqs., Washington, D.C.); on behalf of Telephone Users Association, Inc., Messrs. *Arthur S. Curtis* and *Mel Laney;* on behalf of the City of Chicago, Messrs. *Bernard Rane* and *Mark Goldstein*, Assistant Corporation Counsel for Mr. *Richard L. Curry*, Corporation Counsel, City of Chicago; on behalf of the Trial Staff, Common Carrier Bureau, Federal Communications Commission, Messrs. *Asher H. Ende*, *Peter M. Andersen*, *William L. Fishman* and *A. Michael Cappelletti;* on behalf of National Telephone Cooperative Association (NTCA), Mr. *Robert J. Leigh;* on behalf of the Secretary of Defense and all Executive Agencies of the United States Government, Messrs. *Curtis L. Wagner, Jr.* (Chief, Regulatory Law Division, Office of the Judge Advocate General, Department of the Army) and *Wolfgang Drescher* (of the Regulatory Law Division, Office of the Judge Advocate General, Department of the Army); on behalf of Data Transmission Company (DATRAN), Messrs. *John M. Scorce* (General Counsel), *Michael L. Glaser*, and *Francis E. Fletcher, Jr.;* on behalf of United States Independent Telephone Association (USITA), Mr. *Thomas J. O'Reilly;* on behalf of the Western Union Telegraph Company, Messrs. *Jack Werner*, *Robert N. Green* and *David H. Lubetsky;* on behalf of American Broadcasting Company, Inc. (ABC), Mr. *Robert J. Kaufman;* on behalf of Columbia Broadcasting System, Inc. (CBS), Mr. *Joseph DeFranco;* on behalf of National Broadcasting Company, Inc. (NBC), Mr. *Howard Monderer;* on behalf of all three networks (ABC, CBS and NBC), Messrs. *Joseph M. Kittner*, *John L. Tierney* and *Norman P. Leventhal* (of McKenna & Wilkinson, Esqs., Washington, D.C.); on behalf of Atlantic Richfield Company, Messrs. *Alan Y. Naftalin* and *George V. Wheeler* (Koteen & Burt, Esq., Washington, D.C.); on behalf of National Retail Merchants Association, Inc. (NRMA), Messrs. *David L. Hill* and *William H. Borghesani, Jr.* (of Keller & Heckman, Esqs., Washington, D.C.); on behalf of the City of New York, Mr. *J. Lee Rankin*, Corporation Counsel by Mr. *Francis I. Howley*, Assistant Corporation Counsel; on behalf of Air Transport Association of America (ATA), Messrs. *James E. Landry* (General Counsel) and *William E. Miller* and *Herbert E. Forrest* (of Steptoe & Johnson, Washington, D.C.); on behalf of Aeronautical Radio, Inc., Messrs. *Donald C. Beelar*, *John L. Bartlett* and *Charles R. Cutler;* on behalf of American Telephone Consumers Council, Mr.

George Levine and Mrs. *Eleanor Martell;* on behalf of Communications Workers of America, Mr. *Charles McDonald;* on behalf of The Public Service Commission of the State of West Virginia, Mr. *John E. Lee*, Chief Counsel; on behalf of Grass Roots Action, Inc., Messrs. *Richard Ottinger* and *Terry Lenzner;* on behalf of the State of New Jersey, Messrs. *Kenneth F. Yates*, Deputy Attorney General, *William E. McGlynn and Jack B. Kirsten* (Newark, New Jersey); on behalf of the Commonwealth of Pennsylvania, Mr. *Gordon P. MacDougall*, Special Assistant Attorney General, Washington, D.C.; and *Anthony R. Martin-Trigona*, for himself.

I. Introduction

Nature of the Proceeding

1. This proceeding is an investigation pursuant to Sections 201(b), 202(a), 204, 205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201(b) et seq., into the lawfulness of certain charges that are presently in effect subject to accounting and refund provisions and charges that are proposed for the future applicable to interstate message toll telephone service (MTS). This service is furnished throughout the United States by American Telephone and Telegraph Company (AT&T) and its Associated Bell System telephone companies and interconnecting non-Bell System telephone companies over the nationwide switched telephone network. The specific tariff in issue is Tariff F.C.C. No. 263 of the American Telephone and Telegraph Company. AT&T files this tariff for itself and for all the other interconnecting companies, both Bell System and non-Bell System companies, that participate in furnishing interstate MTS.

2. On November 20, 1970, AT&T filed revisions to the aforementioned tariff (Transmittal No. 10989) proposing to increase the charges for interstate MTS by some $760 million a year on the basis of the then current traffic volumes and usage. The changes were designed to increase Bell's overall interstate and foreign communications service rate of return to 9.5% by increasing earnings of Bell by an estimated $546 million a year before Federal income taxes (FIT) and after taking usage shifts, shrinkage and cost adjustments into account. By letter adopted January 12, 1971, we requested AT&T to postpone the effective date of these tariff changes and granted permission to the company to file revised tariffs in lieu thereof which would increase the Bell System's net earnings before FIT by not more than $250 million a year pending the outcome of an expedited hearing on the lawfulness of both the November 20, 1970 proposal and the new revisions. AT&T complied with our request and filed revised tariffs (Transmittal No. 11027) on January 14, 1971 designed to have this effect after the aforementioned adjustments, to be effective January 21, 1971.

3. On January 20, 1971, we adopted a brief order, 27 F.C.C. 2d 149 initiating the proceeding herein and suspending the effectiveness of the new rate schedule until January 26, 1971. This order also required all carriers collecting the increased charges to keep detailed records of all interstate calls other than sent-paid coin box and hotel guest-initiated calls so that if the rates were found excessive, the refunds, with interest could be ordered. The following day, on Janu-

ary 21, 1971, we issued a Memorandum Opinion and Order, in which we discussed in detail the various questions presented by the new and proposed rate schedules and formulated the issues that were to be considered in this proceeding. 27 F.C.C. 2d 151

4. In our Order of January 21, 1971, we specified that the trial staff of the Common Carrier Bureau (hereafter Trial Staff) was to be separated from the decision making process as recommended by the Administrative Conference of the U.S. We also specified that the burden of proof, as well as the burden of going forward with the evidence, was to be on AT&T and the Associated Bell System companies who were named as party Respondents. We ordered a hearing before a Hearing Examiner who was directed to issue an expedited Initial Decision on the rate of return or Phase I issue, hereafter described.

5. On January 29, 1971, the Trial Staff filed a Petition for Reconsideration in which it requested that the Commission suspend for three months the revised rates with respect to sent-paid coin box and hotel guest-initiated calls. We denied this Petition in our Memorandum Opinion and Order released March 3, 1971, F.C.C. 71–185. 27 F.C.C 2d 914.

Issues and Relationship to Other Docket Cases

6. In our Memorandum Opinion and Order of January 21, 1971, 27 F.C.C. 2d 151, we designated various issues of broad scope to be considered in the proceeding. However, we directed that the issues be heard and determined in two phases. We stated that the 9.5% overall rate of return objective of the Bell System for its interstate operations was substantially higher than the range of 7.0% to 7.5% we found reasonable in our decision in Docket 16258. 9 F.C.C. 2d 30. Accordingly, we designated this rate of return question as a prime issue to be resolved in the first phase of this proceeding. (Hereafter referred to as Phase I). The other issues which we designated for consideration in the second phase (hereafter Phase II), called for examination of those matters that could affect the revenue requirements of AT&T and the Associated Bell System operating companies including the reasonableness of the prices of the Bell System's manufacturing and supply affiliate, Western Electric Company, Inc. and the amounts claimed by the Bell System for investment and operating expenses and for examination of the interstate rate structure of MTS. With respect to these Phase II issues, we also retained jurisdiction in the proceeding until we reach a determination in Docket No. 19143, in the matter of the Petitions filed by the Equal Employment Opportunity Commission, concerning the effect, if any, of alleged discriminatory practices of the Bell System companies on their revenue requirements.

7. We made clear in our Order of January 21, 1971, that with respect to the Phase I overall rate of return issue, there was a concurrent proceeding under way in Docket 18128 that involves questions relating to the implementation of our findings in Phase I on rate of return. Thus, the issues in Docket 18128 concern, *inter alia*, the principles that should govern in the assignment of the Bell System's revenue requirement among its principal classes of interstate and foreign services.

Accordingly, our January 21, 1971 Order provided that implementation of our findings in Phase I will be subject to the determinations to be made in Docket 18128 insofar as they relate to the assignment of revenue requirements to MTS that we may find herein in Docket 19129.

8. In connection with the aforementioned relationship of Docket 18128 to the issue herein, the Trial Staff filed a Petition for Clarification on April 15, 1971 in which it raised the question of whether the Bell System was required to prove that any additional revenue requirements it may have should be loaded exclusively on MTS during the interim period until a decision is reached in Docket No. 18128 and whether, alternatively, we should specify that, in the event of a failure of such proof, any interim earnings increase must be effectuated by increasing charges for all interstate services proportionately. By Memorandum Opinion and Order of June 29, 1971, we noted that the Bell System had undertaken to consider increases on non-MTS services and to propose such increases for each service as appeared to be consistent with sound rate making principles, and we stated that we expected AT&T to propose appropriate rate adjustments. We concluded that neither the Examiner nor the Commission need deal with rate relationships in Phase I. 30 F.C.C. 2d 503.[1] On December 23, 1971, we issued an order dismissing the proceeding herein as to the issues in Phase II. 32 F.C.C. 2d 691. By a further Memorandum Opinion and Order released January 28, 1972, we reversed that action and reinstituted the proceedings herein as to the Phase II issues. 33 F.C.C. 2d 269. However, the Phase I issue on the fair rate of return for the Bell System's interstate and foreign communications service is the sole issue to be resolved in our decision herein with the implementation thereof to be related appropriately to the proceedings in Docket 18128.

Parties

9. As heretofore stated, AT&T and the Associated Bell System companies were named party Respondents herein. Thus, in addition to AT&T, the parent company, the parties respondent are: New England Telephone and Telegraph Company; New York Telephone Company; New Jersey Bell Telephone Company; Bell Telephone Company of Pennsylvania; Diamond State Telephone Company; C & P Telephone Company; C & P Telephone Company of Maryland; C & P Telephone Company of Virginia; C & P Telephone Company of West Virginia; Southern Bell Telephone & Telegraph Company; South Central Bell Telephone Company; Ohio Bell Telephone Company; Michigan Bell Telephone Company; Wisconsin Telephone Company; Illinois Bell Telephone Company, Inc.; Northwestern Bell Telephone Company; Southwestern Bell Telephone Company; Mountain States Telephone & Telegraph Company; Pacific Northwest Bell Telephone Company; Pacific Tel. & Tel. Co.; Bell Tel. Co. of Nevada; Southern New England Tel. Co.; and Cincinnati Bell, Inc.

10. All of the aforenamed companies (referred to herein collectively as "Bell", "Bell System" or "Respondents") participate in pro-

[1] A petition for reconsideration of our June 29, 1971 action, filed by Microwave Communications, Inc. is discussed hereinafter.

viding interstate and foreign communications services including MTS. Such services are, in general, offered jointly, under a nationwide uniform schedule of rates, by the Bell System and about 1800 non-Bell, or independent companies, over a nationwide network of interconnected exchange and toll telephone facilities. Under the Bell System's division of revenue arrangements and practices, each operating telephone company in the Bell System obtains the same rate of return on its investment allocated to interstate and foreign communications services. (See 9 F.C.C. 2d at page 38). Accordingly, the Bell System made a unified presentation herein on the rate of return issue.

11. In addition to the Bell System, the other parties herein were the Trial Staff, federal, state and city government representatives, non-Bell independent telephone companies, competitors, user groups, and labor representatives. The parties presenting or proffering testimony and evidence for the record were: The Bell System; the Trial Staff; the Secretary of Defense on his own behalf and that of all executive agencies of the Federal government; the United States Independent Telephone Association; Microwave Communications, Inc.; and the Telephone Users Association (TUA).

12. Following the closing of the record on June 3, 1971, Proposed Findings of Fact were filed by the Trial Staff; Bell; United Telephone System; Telephone Users Association; Microwave Communications, Inc.; The Secretary of Defense on his behalf and in behalf of all Executive Agencies of the United States; The American Telephone Consumers' Council, on its own behalf and on behalf of Mrs. Florence Rice, Director, Harlem Telephone Audit Bureau and Miss Florence R. Kennedy, Director Consumer Information Service; United States Independent Telephone Association; GTE Service Corporation; and Grassroots Actions, Inc. An amendment to its Proposed Findings of Fact was filed by Grassroots Action, Inc. and by Reuben B. Robertson and Ralph Nader, requesting that the named individuals be included as parties filing jointly with Grassroots Action, Inc. on its original Proposed Findings of Fact. In addition, separate briefs were filed by: Air Transport Association of America; American Broadcasting Company; Columbia Broadcasting System and National Broadcasting Company; GTE Service Corporation; The Commonwealth of Pennsylvania; The State of New Jersey; The City of Chicago; Aeronautical Radio, Inc.; United States Independent Telephone Association. A Statement in lieu of Proposed Findings was filed by Data Transmission Company and Western Union Telegraph Company. A Memorandum on Rate of Return was filed by the Utility Users League.

Initial Decision and Exceptions

13. On August 31, 1971, the Hearing Examiner issued his Initial Decision (I.D.), appended hereto, in which he set forth his findings and conclusions as to the fair overall rate of return for the Bell System Respondents for their total interstate and foreign communications services. As more fully discussed hereinafter, the I.D. concluded that a fair and reasonable rate of return ranged from 7.9 percent to 8.8 percent with current economic conditions justifying a rate of return of 8.25 percent within that range. Exceptions were filed to the I.D. by the Bell System; Trial Staff; Telephone Users Association;

American Broadcasting Company; Columbia Broadcasting System and National Broadcasting Company; GT&E Service Corporation; City of Chicago; Department of Defense; USITA; Commonwealth of Pennsylvania; United Telephone System; MCI; Utility Users League; and Communications Workers of America. Reply briefs to exceptions were filed by the Bell System, Trial Staff, USITA, MCI, Commonwealth of Pennsylvania and American Telephone Consumers' Council. The Commission held oral argument *en banc* on the exceptions on October 26 and 27, 1971.

New Economic Program

14. Following the close of the record, the President instituted a new economic program to combat inflation. On August 15, 1971 he ordered a 90-day freeze on prices and wages, and on October 7, 1971 he announced that a wage and price control program would be put in force when the freeze expired on November 13, 1971. A Price Commission was established under the provisions of Section 215 of the Economic Stabilization Act of 1970, as amended. On November 11, 1971 the Price Commission released a tentative set of guidelines and rules governing price increases for regulated public utilities, including telephone carriers. On January 12, 1972, the Price Commission revised its tentative rules (Sections 300.16 and 300.51) and set forth a detailed set of guidelines it expected to follow in reviewing price increases to such public utilities.

15. Following hearings in February, 1972, the Price Commission issued new regulations, effective June 1, 1972, applicable to "interim" rate increases by Public Utilities. Under these rules an "interim rate" was defined as "an increased rate allowed to go into effect by operation of law, or by action or inaction of a regulatory agency, pending a final determination by that agency on the requested increase" 6 C.F.R. 300.16(a)(1), and before an "interim rate" could go into effect, the regulatory agency was required to suspend the rate for the maximum period authorized by law. In addition, the utility was required to certify in writing to the regulatory agency (copy to the Price Commission) that (i) the increase is cost-justified and does not reflect future inflationary expectations; (ii) the increase is the minimum required to assure continued, adequate and safe service or to provide for necessary expansion to meet future requirements; (iii) the increase will achieve the minimum rate of return needed to attract capital at reasonable costs and not to impair credit; (iv) the increase does not reflect labor costs in excess of that allowed by Price Commission policies; and (v) the increase takes into account expected and obtainable productivity gains, as determined under Price Commission policies. Further, the utility was required to furnish the Price Commission proof of newspaper publication of notices of such interim rate requests and of procedures for public requests for proceedings thereon 6 C.F.R. 300.16(a)(c).

16. Effective September 18, 1972 the Price Commission issued a remodification and clarification of its rules relating to Public Utilities (37 F.C. 18893). The new Section 300.307 governing interim rates (6 CFR 300.307) applies whether or not the regulatory agency has been certified by the Price Commission as having adopted rules in compli-

viding interstate and foreign communications services including MTS. Such services are, in general, offered jointly, under a nationwide uniform schedule of rates, by the Bell System and about 1800 non-Bell, or independent companies, over a nationwide network of interconnected exchange and toll telephone facilities. Under the Bell System's division of revenue arrangements and practices, each operating telephone company in the Bell System obtains the same rate of return on its investment allocated to interstate and foreign communications services. (See 9 F.C.C. 2d at page 38). Accordingly, the Bell System made a unified presentation herein on the rate of return issue.

11. In addition to the Bell System, the other parties herein were the Trial Staff, federal, state and city government representatives, non-Bell independent telephone companies, competitors, user groups, and labor representatives. The parties presenting or proffering testimony and evidence for the record were: The Bell System; the Trial Staff; the Secretary of Defense on his own behalf and that of all executive agencies of the Federal government; the United States Independent Telephone Association; Microwave Communications, Inc.; and the Telephone Users Association (TUA).

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American Broadcasting Company; Columbia Broadcasting System and National Broadcasting Company; GT&E Service Corporation; City of Chicago; Department of Defense; USITA; Commonwealth of Pennsylvania; United Telephone System; MCI; Utility Users League; and Communications Workers of America. Reply briefs to exceptions were filed by the Bell System, Trial Staff, USITA, MCI, Commonwealth of Pennsylvania and American Telephone Consumers' Council. The Commission held oral argument *en banc* on the exceptions on October 26 and 27, 1971.

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15. Following hearings in February, 1972, the Price Commission issued new regulations, effective June 1, 1972, applicable to "interim" rate increases by Public Utilities. Under these rules an "interim rate" was defined as "an increased rate allowed to go into effect by operation of law, or by action or inaction of a regulatory agency, pending a final determination by that agency on the requested increase" 6 C.F.R. 300.16(a)(1), and before an "interim rate" could go into effect, the regulatory agency was required to suspend the rate for the maximum period authorized by law. In addition, the utility was required to certify in writing to the regulatory agency (copy to the Price Commission) that (i) the increase is cost-justified and does not reflect future inflationary expectations; (ii) the increase is the minimum required to assure continued, adequate and safe service or to provide for necessary expansion to meet future requirements; (iii) the increase will achieve the minimum rate of return needed to attract capital at reasonable costs and not to impair credit; (iv) the increase does not reflect labor costs in excess of that allowed by Price Commission policies; and (v) the increase takes into account expected and obtainable productivity gains, as determined under Price Commission policies. Further, the utility was required to furnish the Price Commission proof of newspaper publication of notices of such interim rate requests and of procedures for public requests for proceedings thereon 6 C.F.R. 300.16(a)(c).

16. Effective September 18, 1972 the Price Commission issued a remodification and clarification of its rules relating to Public Utilities (37 F.C. 18893). The new Section 300.307 governing interim rates (6 CFR 300.307) applies whether or not the regulatory agency has been certified by the Price Commission as having adopted rules in compli-

ance with the Price Commission regulations. With certain exceptions (noted below) the rules require suspension of interim rates for the maximum period authorized by law and the running of the suspension period before an interim rate may go into effect. The rules also require a certificate by the utility that the increase complies with the five criteria set forth above, and proof of public notice. A substantive change in the revision, however, is that, in addition to the previous exemptions to the suspension requirement—emergency and previous suspensions—the regulatory agency is not required to suspend an interim increase if it finds, in an order, that such suspension would create "undue hardship or gross inequity" (6 CFR 300.307(c)(1)).

Oral Re-argument

17. On July 24, 1972, we issued our Memorandum Opinion and Order in which we noted the New Price Commission regulations applicable to "interim" rates, and positions of the Trial Staff, Respondents and the Hearing Examiner, that it would be appropriate for us, in reaching our decision herein, to take account of relevant financial data applicable to the period subsequent to the close of the record. Accordingly, we specified certain data concerning Bell's long term debt costs and operating results since the close of the record which we intended to notice and we ordered a limited re-argument on the rate of return issue herein in the context of both the changes reflected by such financial and operating data and the Price Commission's regulations applicable to any "interim" rates which may be authorized by our decision herein. FCC 72–662, July 24, 1972; — FCC 2d —. Re-argument was held before us on September 19, 1972, and we summarize hereinafter the positions of the parties at the re-argument.

Official Notice of Additional Data

18. In preparation for the oral re-argument, the Trial Staff, on August 3, 1972, requested Bell to provide certain new, revised, and updated data relating to the earlier record testimony of Mr. Scanlon (Bell's Exhibits 7 and 45). This information was submitted by Bell on August 18, 1972 and included, among other things, more current information concerning the consumer price index, Bell's preferred stock, Bell's intermediate and short-term debt, Bell's interest coverage, AT&T shareowners' statistics, maturing dates of Bell's debt, Bell's construction program, market data on AT&T warrants; and the capital structure, interest coverage and expenditures of electric utilities. In addition to the data set forth in our Memorandum Opinion and Order released July 24, 1972, we take notice of this information submitted by Bell which is more specifically identified in Appendix A hereof as part of Bell's testimony and data (Paragraph 41, Appendix A).

19. At the re-argument, the Trial Staff requested us to take notice of additional data and information which was not included in our Memorandum Opinion and Order of July 24, 1972 and we shall grant this request. Such additional data and information are described more fully in Appendix B hereof as part of the testimony and data of the Trial Staff (Paragraphs 14–15 of Appendix B).

Special Tariff Application

20. On September 1, 1972, AT&T filed a special tariff application requesting permission to re-file the $545 million rate increase tariffs that were originally filed on November 20, 1970, with the intent that such tariffs would then be suspended by us for the 3-month period specified in Section 204 of the Act. The stated objective of this application was to obviate any claim that we had not suspended these rate increases for the maximum period authorized by law within the meaning of the Price Commission's rules. On October 26, 1972, we released our Memorandum Opinion and Order denying this application. We held, *inter alia*, that we had already suspended the tariffs pending our decision herein and that the Price Commission rules did not require any further suspension by us of any "interim" rate increases that we might allow herein. FCC 72–942, October 26, 1972; — FCC 2d —.

II. Summary of Positions

The Bell System Position

21. Pursuant to the requirements of Section 61.38 of our Rules, 47 C.F.R. 61.38, the Bell System submitted its case-in-chief in writing on November 20, 1970 at the time of the filing of the original rate increases in issue. The claims made at that time by the Bell System are summarized in the following paragraph.

22. The Bell System needed more than $7 billion annually to fund its construction program, and the bulk of this, well over $4 billion a year, must come from external financing. Because the market price of AT&T stock was at about book value, new equity could not be floated without unfairly injuring existing stockholders. Further, additions to Bell System debt were not advisable because the capital structure was already about 45% debt, which was as high as it should be. Changes in economic conditions since the 1966–1967 period covered by the Commission's Decision in Docket No. 16258 had increased the embedded cost of debt from 4% to about 6% and the cost of equity capital had risen to at least 12.5%. Aside from the need to raise additional capital, Respondents claimed that, under then existing conditions, stockholders were entitled to these increased equity earnings. Respondents requested an increase in their allowed rate of return from the range of 7.0–7.5%, which we had fixed in Docket 16258, to 9.5%. This return of 9.5% would properly compensate existing stockholders and, in addition, would result in a sufficient elevation of the market price above book value to permit the successful sale of new equity needed to finance the construction of facilities required to provide high grade service to the public. Respondents claimed that their overall rate of return for interstate and foreign communications service was about 7.5% for the year 1970 and that, without the proposed rate increases filed on November 20, 1970, the return for 1971 would be 7.4%; and that, with a net investment of about $13.6 billion for 1971, Respondents required a total increase in earnings before Federal Income Taxes of $546 million a year in order to increase their return from 7.4% to 9.5%.

23. In the proceedings before the Hearing Examiner, Respondents presented the testimony of 12 witnesses and written evidence to sup-

port essentially the same position as was set forth in its original case-in-chief, except as to the amount of the increase in rates necessary to provide the needed earnings. Respondents contended before the Examiner that their projected earnings for 1971 would be 7.2% rather than the earlier estimated 7.4% and that, in addition to the $250 million increase which went into effect on January 26, 1971, the Bell System would need a further increase of $350 million a year or a total of $600 million annually in order to improve the Bell System's return to the requested 9.5% level.

24. The Bell System's exceptions to the Examiner's Initial Decision can be summarized as follows: Although the Examiner correctly found that the embedded cost of debt is 6.0% and that the cost of equity has increased since our Decision in Docket No. 16258, the conclusion of an 8.25% overall return based upon a 10.3% return on equity, a debt cost of 6.0% and a debt ratio of 48% provides no increase whatsoever in the cost of equity since our Decision in Docket No. 16258. Respondents claim that 8.25% is grossly inadequate under current conditions and that the Initial Decision seriously understates the fair return on equity capital (a) by not recognizing the significant rise in the cost of equity since the Decision in Docket No. 16258; (b) by rejecting any comparison with the earnings on equity of electric utilities; (c) by not recognizing the need of the Bell System to raise new equity capital and to be able to do so on reasonable terms, particularly at prices in excess of book value; (d) by dismissing as unpersuasive the contentions of the Bell System that its credit cannot be maintained unless it can arrest the decline in interest coverage and maintain it at a level comparable to the interest coverage of the highest rated electric utilities (Aaa); (e) by undue reliance on the testimony of witnesses for the Trial Staff on the return on book equity; and (f) by concluding that the Bell System should work toward a 50% debt ratio.

25. The Bell System concurred in the Examiner's conclusion that the upper end of the range of the Bell System's fair rate of return should be set 0.55 percentage point above the level at which rates are adjusted. However, Respondents claim that the Examiner's recommendation that there be "conscious use of 'regulatory lag'" would be ineffective under today's conditions.

The Trial Staff Position

26. The Trial Staff provided two witnesses. Briefly summarized, its Proposed Findings and Conclusions submitted to the Hearing Examiner, were to the effect that the Bell System had failed to meet its burden of showing (a) that the heavy construction program expenditures made by the Bell System have been made prudently and economically, or (b) that 45% is the maximum amount of debt it can safely and prudently carry, or (c) that the cost to Bell of equity capital is in the range of 11–13%. On the contrary, the Trial Staff contended that it is now safe, prudent and economical for the Bell System to follow a policy of a 50% debt ratio in its capital structure, and that its unduly conservative past and present financial policies have unreasonably increased the present capital cost burden; that the current cost of equity capital to the Bell System is in the area of 9.75% to 10.25%

using an embedded cost of debt of 5.94% and a debt ratio of 45.3%; and that taking into account (a) the errors of management in the past in the construction and financing program of the Bell System, (b) the quality of service, and (c) the economic uncertainties at this time, the Bell System should be allowed to earn in the range of 7.75% to 8.25% and that rates for their interstate services should be adjusted so as to permit it to earn at the mid-point of this range, or 8.0%.

27. The Trial Staff further contended in its Proposed Findings that, since the Bell System realizes earnings from its investment in Western Electric (WE) in excess of its earnings from communications services, the Bell System's allowable earnings on interstate communications services, as distinguished from its WE investment, should be at about 7.8%. Finally, the Trial Staff estimated the interstate earnings of the Bell System for 1971 to be 8.29% and proposed that this should be reduced to 7.8% by a reduction in MTS rates by $133,000,000 a year with appropriate refunds.

28. With respect to the Examiner's I.D., the Trial Staff, in its exceptions, contends that the Examiner was too generous in fixing the fair rate of return at 8.25% within a range of 7.9 to 8.8%, in finding that the cost of equity capital is 10.3%, and in finding that the cost of new debt will be 7.8%. In summary, the exceptions of the Trial Staff assert that the Examiner arrived at his erroneous conclusions for the reasons, *inter alia*, that he (a) failed to take into account the President's New Economic Policy that will benefit Bell System by lowering the cost of money and the required return, by providing investment tax credit allowances, and by increasing the level of interstate revenues; (b) he failed to adjust the overall fair return of the Bell System by the amount of the excess WE earnings; (c) he erroneously refused to give appropriate weight to the effect of past management of the construction and financing programs on cost of capital, and (d) he incorrectly blamed government regulation in part for such past bad management. The Trial Staff contends in its exceptions that the New Economic Program strengthens and re-affirms the hearing record basis for the Trial Staff's proposed 7.75–8.25% fair rate of return based on a debt ratio of 45%, a current cost of debt of 7.5%, and an embedded debt cost of 5.94%.

Position of Carriers Other Than Bell

29. USITA presented two witnesses to support its position, concurred in by the GTE Service Corporation, and United Telephone System, that the Bell System requires a 9.5% return on its interstate and foreign communication services. Western Union, MCI and Datran took no position on the rate of return required by Bell. Their interest was limited to whether, and to what extent, any permitted increases, should be loaded on MTS. Thus, MCI, at oral argument, took the position that, even if we find that Bell System is entitled to a higher rate of return, we cannot implement such a decision until we decide the rate-making issues in Docket No. 18128. Otherwise, it is argued, MCI's competitive position will be undermined by undue increases in MTS which would enable Bell to underprice its competitive services.

Position of Users and User Groups

30. The Secretary of Defense, for the Department of Defense and other Federal agency users, presented one witness and took the position that the Bell System has not proven the need for any increase in its allowable rate of return and should be denied any rate increase. The Commonwealth of Pennsylvania urges us to make no change in the allowable rate of return for the Bell System from the 7–7½% permitted in Docket No. 16258. It requests us to reopen the record for further proceedings to consider the impact of the New Economic Policy on the cost of capital, and to refund increased charges collected by the carriers since January 26, 1971, to the extent that the return exceeded 8.0%. The City of Chicago contends that a rate of return of 8.2% would be proper for the Bell System based upon a 45–55 debt/equity ratio, an embedded cost of debt of 6.0%, and a return on equity of 10.0%.

31. The American Telephone Consumer's Council submitted proposed findings to the effect that we should deny completely any increase in rates on the grounds that the Bell System has not proven the need for the claimed 9.5% return. However the interest of that party appears to be primarily in the internal rate structure of MTS. The Telephone Users Association (Mr. Arthur Curtis) presented one witness in rebuttal to certain portions of rate of return testimony of the Bell System. We assume that this party is also opposed to any increase in allowable return for the Bell System. Utility Users League also objects to the findings and conclusions of the I.D. and takes the position that the Bell System should not be allowed any increases in rates and should refund all increases collected since January 26, 1971. Grassroots takes no position on the rate of return issue but objects to certain procedures herein.

32. The remainder of the parties; namely, ARINC, ATA, and the broadcast networks (ABC, CBS, and NBC) take no position on the issue of overall rate of return. Their interest is limited to the question of whether, and to what extent, any increases in rates necessary to achieve any allowable higher rate of return may be loaded on classes of service other than MTS. The aforementioned networks, at oral argument, asked for an opportunity to a hearing before any decision is made as to how any allowable rate increases would be apportioned among the various classes of Bell System services.

Other Parties

33. The Communications Workers of American (CWA) took no position on the rate of return issue. It objects to that part of the I.D. that purports to foreclose CWA from participating in the issues in Phase II.

Appendices

34. The immediately preceding paragraphs 21–33 summarize the basic positions of the parties. In appendices A, B and C hereof we set forth in greater detail the testimony and data presented by the Bell System (App. A), the Trial Staff (App. B) and the Other Parties (App. C).

Reargument

35. The position of the Bell System at the time of re-argument was unchanged from its earlier position. Thus, it summarized its own position by stating that there was an "increasingly urgent need for a level of earnings to permit the raising of common equity capital required to finance construction programs"; that "current financial data reinforce Bell's showing that 9.5 percent is the minimum rate of return required to attract capital at reasonable costs"; that "current interstate operating results confirm the need for adjustment in the interstate rate level"; and that "applicable Price Commission regulations recognize the need for, and permit, the interim rate adjustment which should be authorized" herein:

36. The position of the Trial Staff at re-argument was also unchanged from its original position.[2] Its re-argument may be summarized as follows: a return of 8% to respondents (before the Western Electric adjustment) would be just and reasonable and would meet all of the statutory criteria; the events occurring after the close of the record indicate that 8% overall return for interstate services is on the generous side; there has been an easing of both inflationary pressures and interest rates; the economy, which was faltering a year ago, is now surging forward; increases in productivity will offset inflationary trends in the next 2–3 years; the Commission should deny inflationary price increases and hold Bell to a reasonable profit level; Bell is seeking a 6.6% increase in prices over current tariff rates for interstate services to meet its 9.5% earnings objective; if the 9.5% objective were to be accepted system-wide, an average increase of over 9% above the charges in effect at the end of May 1972 would be required; and that these increases are over and above all of the increases thus far allowed Bell both by the Commission and the various state Commissions.

37. The Trial Staff further contended, at re-argument, that since the end of October 1972, 33 separate orders have been issued by state Commissions authorizing increases estimated by AT&T as allowing the system over $1,200,000,000 in rate increases on an annual basis; to reach Bell's goal additional increases totalling well over a billion dollars would be required; and that price increases of these magnitudes on top of previous price increases are unthinkable at a time when strenuous efforts to control inflation are beginning to take hold.

38. Further, the Staff asserted that even under the conditions found to exist when Bell's case was originally prepared the requested rate of return was by far too high; that the changes which took place in the economy between the original filing and the first oral argument demonstrated clearly that the rate being sought was exorbitant; that the current relative stabilization of the prices, the control of inflation, the growth in production, the expansion of the economy, the experienced interstate return of Bell and the future prospects for continued growth all indicate that the Staff's recommendations are, if anything, on the high side. Finally, the Staff contended that Bell's unchanged requests

[2] The Trial Staff originally recommended a reduction in Bell's rates to achieve its recommended rate of return, because of a higher estimated level of earnings. At re-argument the Trial Staff recognized that Bell now should be allowed to increase its rates in view of the lower actual earnings experienced thus far in 1972.

are clearly beyond the pale and should be rejected promptly, forcefully and unequivocally.

39. GTE, USITA, MCI, DOD, Pennsylvania, Chicago, ATCC and TUA essentially reiterated their original positions at re-argument, and these positions have been adequately summarized in the preceding paragraphs. Anthony R. Martin-Trigona argued, among other things, that the present rate of return of Bell is adequate; that a rate increase at this time would add inflationary pressure on the economy; and that a rate increase is not in the public interest. The State of New Jersey asserted that the events occurring after the closing of the record reduce the necessity for increased rates for Bell; and that Bell could reduce its capital needs if it gave users the option of buying subscriber equipment, such as PBX's and telephones.

III. Discussion

Introduction

40. In our 1967 Decision in Docket 16258 we set forth the basic principles to guide us in determining the fair rate of return for carriers subject to our jurisdiction. We stated that, in simplest terms, rate of return is a percentage expression of the cost of capital; that this cost is as real as any other costs necessary to conduct the business of the carrier; and that we must determine what this cost is and whether it has been prudently incurred and is otherwise reasonable, and, if not, whether some other cost should be used for rate-making purposes in accordance with established legal standards (9 F.C.C. 2d 51–52).

41. We further stated in our 1967 Decision that the Bell System has historically raised capital by the issuance of both debt and equity securities, the rate of return to which it is entitled is the weighted average of the cost of debt (interest) and the earnings or profit it requires on the invested equity capital. We held that, since the rate of return is affected by the proportion of debt and equity to the total capitalization (i.e., capital structure), Respondents have the duty to fix this proportion in such a way as to raise the required capital "at the lowest possible cost consistent with their overall responsibility to provide modern, efficient service at reasonable rates and to maintain the financial integrity of the enterprise" (9 F.C.C. 2d 52).

42. We found in 1967 that, on the basis of the hearing record then before us in Docket 16258, and our considered judgment, the fair rate of return to the Bell System at that time for their interstate operations was in the range of 7–7½% (9 FCC 2d 88). With this conclusion, we ordered substantial reductions in rates (which became fully effective in 1968) in order to reduce the earnings of Respondents to the level found reasonable. However, we stated in our 1967 Decision that the 7–7½% range was to be applicable only so long as the conditions that obtained during the test period used in that proceeding (i.e., 1966) continued and that these figures did not represent either an absolute floor or ceiling, but were subject to revision as circumstances changed (9 FCC 2d 964). In 1969 we negotiated a $150 million a year reduction in rates and re-examined the operating results of the Respondents in the context of our 1967 Decision. With due regard to the aforesaid $150 million rate reduction, we decided that "interstate rates producing an earnings level which exceeds the upper limit of the 1967 range

(7.5 percent) are not unreasonable." We made this decision because we recognized that, by 1969, substantial changes had taken place in the economic, financial and other conditions which prevailed at the time of our 1967 Decision. We particularly noted the sharp increase in the interest rates on borrowed capital, the increase in the embedded cost of debt, and the much higher rate of inflation, and the need of Respondents to raise substantial amounts of new capital under such changed conditions (21 FCC 2d 654). When we issued our Order of January 21, 1971, designating this matter for hearing we reiterated our recognition "that changes had taken place in the various elements which make up the cost of capital since the Commission's 1967 Decision in Docket 16258" (paragraph 8).

43. It is therefore clear that a part of our task in this case is to evaluate the testimony, data and contentions of the parties herein with respect to the nature and scope of the changes that have occurred since our 1967 Decision. However, we reject the apparent contention of Bell that we can take the amounts that we found as the cost of capital at that time and add on certain increments to reflect such changes. We must determine, on the basis of the entire record herein, what rate of return is warranted under current and immediately foreseeable economic and financial circumstances for Bell's interstate and foreign communications services.

Cost of Equity Findings in Docket 16258

44. We address ourselves first to what appears to be a prime contention of the Bell System that, in our 1967 Decision in Docket 16258, we concluded, in effect, that the cost to it of equity capital under 1966 conditions was 10.3% or 10.4%; that this was the allowable return on equity; and that neither the Examiner, in his I.D. nor the Trial Staff in their proposal would allow for any increase therein.

45. This contention first emerges in Bell's Proposed Findings. In its brief, at page 7, it says "Under a 45 percent debt ratio, the allowable overall rate of return of 7½ percent found by the Commission for 1966 conditions would produce a rate of return on equity of 10.4% * * * calculated as follows:

45% debt at 4.0%	1.8
55% equity at 10.4%	5.7
Total	7.5%"

The contention is repeated again in Bell's brief on exceptions at page 3, where the claim is made that the 10.3% return on equity allowed by the Examiner does not reflect "The admitted increase in the cost of equity capital since Docket 16258," and that the "one dominant error" in the I.D. is that the Examiner's finding of 10.3% on equity fails to provide *any* increase in the return on equity since our Decision in Docket 16258 (Page 1).

46. Finally, in its reply brief on exceptions, page 2, Bell contends that the "basic deficiency" in the I.D. is that it recommended a return on equity no higher than our 1967 Decision "would have produced at the same debt ratio" and that "the 8.0% overall rate of return proposed by the Trial Staff reflects its computation using a rate of return on equity of 9.75 percent * * * *as contrasted with the 10.3% percent*

adopted in the Initial Decision and implicit in the Commission's Decision in Docket No. 16258, based upon very different economic conditions" (our italic).

47. We must reject at the outset Bell's contentions that we determined in our 1967 Decision, implicitly or otherwise, that the Bell System was entitled at that time or in the immediately foreseeable future to a 10.3% or 10.4% return on equity.

48. Although we made no quantitative findings as to Bell's allowable equity return, we made it quite clear that we were not approving a return on equity as high as 10%. Thus, we stated unequivocably in our 1967 Decision that "The fact that Respondents were able to raise successfully billions of dollars at average returns on equity ranging from 7 to 8.4 percent, especially when equity in most of the period was being diluted, *does not support Respondents' claim that they now need a 10 percent return on equity. On the contrary, such experience does strongly suggest that an equity return of less than 10 percent* would provide adequate capital protection and maintain Respondents' ability to attract new capital"; and that "we find that regardless of the opinion testimony offered, the record demonstrates that Respondents have in the past, and can in the future, raise the capital they require at returns on *equity below 10 percent*" (9 FCC 2d 74) (our italic). Finally, we stated that we could not accept Mr. Scanlon's testimony on comparable earnings "as valid support for their claim for a return of 10 percent on equity;" and that we were "*unable to accept* the conclusions of Respondents' witnesses Scanlon, Morton and Friend that AT&T requires a return on equity of approximately 10 percent" (9 FCC 2d 86) (our italic).

49. In view of the clear and unambiguous findings quoted above from our 1967 Decision, Bell's contention that we approved at that time a return on equity of 10.3% or 10.4% is untenable and contrary to the explicit findings and conclusions in that case on the cost of capital. Moreover, the actual operating results for the Bell System during the years 1966–1970 demonstrate the fallacy of the aforementioned basic argument of Bell. In the 1966 test period, Bell's average return on equity was 9.9% (with a debt ratio of 32.9%). In 1967, when we made our Decision in Docket 16258, the average return on equity was 9.7% (with a debt ratio of 35.4%). After we rendered our Decision in Docket 16258 and ordered substantial reduction in rates effective early in 1968 to reduce the overall interstate and foreign earnings, the return on equity went down in 1968 to 9.3% (with a debt ratio of 36.4%). Thereafter, in 1969 the return on equity was 9.5% (debt ratio of 39.5%) and in 1970, it was 9.2% (debt ratio of 44.9%). Accordingly, the actual results of our 1967 Decision were to reduce the equity return from about 9.7% in 1967 to about 9.3% in 1968. Moreover, in 1969, when we negotiated a rate reduction, the interstate and foreign earnings of Bell were in excess of the top of the 7–7.5% range and the return on equity was 9.5%, somewhat below the 10.3% or 10.4% Bell contends that we had implicitly approved.

50. In view of the foregoing, we conclude that the Examiner's recommendation of a 10.3% return on equity is in excess of the return on equity we found reasonable or allowed in our Decision in 1967 and any finding or conclusion we may make herein that Bell's return on

equity should be equal to or in excess of 10% is higher than what we considered to be appropriate in our 1967 Decision.

Economic Changes

51. All of the parties herein, who addressed themselves to the question, appear to be in general agreement that the extensive evidence of record herein confirms conclusively that there have been significant economic, financial and other changes since our Decision in 1967 and that these changes have had an effect on the cost of capital of the Bell System.

52. No party, for example, disagrees with the finding of the Examiner that the embedded cost of long term debt has increased significantly from the 4% we found in our 1967 Decision; that the current cost of debt is significantly higher than the range of 5½ to 6% we found in 1967; that Bell's debt ratio has increased from about 32% in 1966 to 45% in 1970; and that its interest coverage declined during the period 1966–1970. Indeed, all parties who addressed themselves to the question agree that these and other changes that have occurred since 1966 have necessarily caused Bell's cost of equity capital to increase since our Decision in 1967. The Examiner found that this was so (see I.D. paragraphs 17, 18, 43 and 103) and the Trial Staff takes no exception to these particular findings. Both of the Trial Staff witnesses testified that the cost of equity capital for Bell had increased since the record in Docket 16258 although Mr. Kosh's position was that we allowed a return in 1967 that was too high. The differences among the parties, which we discuss later, lie in whether and to what extent these changed conditions warrant any revision in the allowable rate of return.

53. We conclude therefore that there have been significant changes in the circumstances since our 1967 Decision that increased the cost of Bell's debt and equity capital. However, as heretofore stated, we must determine whether, and to what extent, such increases, considered with all other relevant considerations developed on the record herein, require or warrant any change in the allowable rate of return of the Bell System for the present and immediate future and if so, what those changes should be.

Cost of Embedded Debt

54. Respondents estimated that by the end of 1971 the total embedded cost of its debt would be about 6%, which figure the Examiner accepted in computing an overall rate of return. The Trial Staff estimated that total embedded debt cost in 1971 would be about 5.94%. The Trial Staff's estimate is lower because it predicted rates for short and long term debt in the last seven months of 1971 that were lower than those predicted by Bell. However, the Trial Staff does not except to the finding of the Examiner that 6% is the embedded debt cost of the Bell System that should be used herein for the determination of the allowable rate of return, and we believe that the evidence supports that finding. Thus we conclude that the embedded debt cost for the Bell System has increased from 4% to 6% in 1971 and that we shall use 6% in our determination of Bell's cost of capital.

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Current Cost of New Debt

55. Ordinarily, the current cost to a carrier of new debt is an important factor in determining for the immediate future both the embedded cost of debt and the current cost of common equity. However, in the case of Bell, the amount of new debt which Bell may reasonably be expected to issue in the immediately foreseeable future at rates higher than the aforementioned embedded debt cost of 6% would not significantly increase Bell's embedded debt cost because of the large amount of long-term debt already outstanding and the limited amount of refunding required for maturing low cost debt. Thus, in Bell's case, the importance of the higher costs of new debt is in its impact upon Bell's current and immediate future costs of equity. Bell correctly claims that a significant rise in the cost of debt capital necessarily results in a rise in the cost of equity capital although, as Bell concedes, "the relationship between equity costs and current debt costs is not precise or linear."

56. Bell claims that the current cost to it of long-term debt is 7.5% to 8.5% and that the trend is upward. Bell relies upon the testimony of its witnesses to the effect that there is "widespread" expectation of a "continuing high level of inflation" that "economic conditions in 1972 are apt to produce a sharper increase in interest rates" and that there is "continuing powerful expectation of a high rate of price level increase" (Bell's P.F. paragraph 17). The Trial Staff contends that the current outlook is for a debt cost of 7.5% with the trend being toward lower interest rates. The Hearing Examiner generally accepted Bell's views and found that the current cost of debt will be 7.5% to 8.0% with the expectation of slowly increasing rates. However, the Examiner also indicated that Bell should be able to reduce the impact of higher long-term debt costs by taking timely advantage of lower cost short-term and intermediate term debt.

57. The hearing record shows that Bell's actual cost of long-term debt ranged from a high of 9.4% in June, 1970, to a low of 6.9% in January, 1971, and back to a lesser high of 8.3% in May, 1971. On this performance, we can find some rational basis for Bell's claim. However, recent developments do not support those claims. We take official notice that the actual average cost of Bell's new long-term debt in 1971 was 7.60% and that the actual cost of long-term debt issues by Bell through October, 1972 averaged 7.51% and ranged from 7.27% to 7.53%. The average cost of intermediate term (5 to 7 year notes) through October, 1972 was 6.68% and ranged from 6.48% to 7.01%. In view of the foregoing, we agree with the Trial Staff that the claims of the Bell System and the findings of the Hearing Examiner, on current cost of new debt, are unsupported and were based upon expectations of inflation which do not take into account the impact of the new national economic policies and programs to curb inflation upon the present and future costs of debt. We appreciate that the parties and the Hearing Examiner did not have before them at the time of the hearings and decision the aforementioned officially noted facts as to the average debt costs for the year 1971 and the costs of the 1972 debt issues. It appears from the record that in most of the testimony as to the relationship between the current cost of equity and current cost of debt the cost of debt or current interest rates referred to cost of long-

term debt. Accordingly, we find and conclude that, for the purposes of comparing current cost of equity to current interest rates in this case, the cost to Bell of long-term debt for the present and in the immediately foreseeable future, is and will be in the range of 7¼ to 7½%.

Current Cost of Equity

58. Having found Bell's embedded debt cost, we must proceed to determine Bell's current cost of equity and the proper capital structure in order to resolve the question of Bell's allowable rate of return for interstate and foreign communications services. As we stated in our 1967 Decision in Docket 16258, our objective in fixing Bell's allowable rate of return is to meet the requirements of the public interest in just and reasonable rates consistent with the judicial precedents holding that the allowable return must be such as to sustain the financial integrity of the operating companies and to enable them to attract capital (9 FCC 2d 52–53).

59. To summarize our conclusions up to this point, we have denied Bell's claim that we ruled in 1967 that Bell was then entitled to a return on equity as high as 10%; we have found that there has been an increase in the current cost of Bell's long-term debt from 5½–6% in 1967 to a present range of 7¼–7½%; that Bell's embedded debt cost has risen from 4% in 1967 to 6% today; and that the increase in debt costs has also been accompanied by an increase in Bell's equity costs since 1967 which we have not quantified. We shall discuss Bell's nine basic contentions to support its claim that its current cost of equity is 12½%.

60. *First*, Bell's claim for a 12½% equity return is based upon the same alleged trends in economic and financial conditions upon which Bell relies to support its claim of a current cost of debt of 7½–8½%. It is of course true that equity costs generally increase as debt costs increase since debt is senior in claim on assets and income and the equity holder bears most of the risk of the business and requires a higher return to compensate for such risk. However, for reasons set forth in preceding paragraphs 43–45, we have rejected Bell's claim that the economic and financial trends referred to by Bell warrant a conclusion that the cost of debt has increased as much as Bell claims. It necessarily follows that, for the same reason, we cannot accept Bell's claim that equity costs have increased as much as Bell claims. We have found that the current cost of debt has risen from a range of 5½–6% in 1967 to 7¼–7½% currently rather than to 7½–8½% claimed by Bell. There is no reasonable basis to conclude that Bell's equity return should be increased from 9.3% in 1968 to 12.5%, for a net increase of more than 3 percentage points, whereas the debt costs have increased by only 1¼ to 2 percentage points. Mr. Scanlon testified that, as interest rates have gone up the spread between such rates and equity costs has become narrower rather than wider. Accordingly, although we recognize that equity costs have increased since 1967 and that Bell is entitled to higher equity earnings, we reject Bell's aforementioned first ground as supporting an increase to 12½%.

61. *Second*, Bell claims that a 12½% equity return is justified by the results reached by Bell in allegedly updating the Gordon model. In the proceedings in Docket No. 16258, Dr. Myron J. Gordon, an inde-

pendent consultant engaged by the Commission, presented an econometric model designed to determine the required rate of return in proceedings involving regulated entities. At that time Dr. Gordon's result with respect to Bell's interstate operations indicated a rate of return of 7% to 7.25%. In the current proceeding Bell presented testimony by Dr. Martin B. Wilk on what Bell described as its own updating of the Gordon model, allegedly reflecting current economic conditions. Dr. Wilk stated that Bell's updating produced an overall rate of return of 10.7% and that, using a debt ratio of 45% and an embedded debt cost of 6%, the return on equity would be 14½%. Thus, Bell's updating of the Gordon model allegedly supports a 14½% return on equity although Bell is not seeking such a high return. Moreover, Bell does not accept the validity of the Gordon model and it did not produce Dr. Gordon as a witness to qualify the updating. In addition, Bell claims that a 10.7% overall return accompanied by a 14½% return on equity is consistent with the Examiner's conclusion (I.D. paragraph 103) that there has been an increase of 3% to 3½% "in the cost of money since 1966." Bell arrives at this conclusion by stating that if you add the Examiner's 3 to 3½% to the 7 to 7½% overall return we found in 1967, the result is an overall return of 10 to 11%.

62. The examiner concludes that no weight should be given to Bell's testimony on the alleged up-dated Gordon model (I.D. para. 62). We concur in the Examiner's conclusion for the reasons that he gives. In addition, we reject Bell's contention that we can or should add the 3% to 3½% increase the Examiner found since 1966 in "the cost of money" to the 7 to 7½% overall rate of return we found reasonable in 1967. It is clear from the context of his decision that the Examiner's 3–3½% findings of increased "cost of money" refer to the increase in interest rates and not overall cost of capital. Moreover, we have found that the increase in interest rates since our Decision in 1967 is not of the magnitude of 3 to 3½% found by the Examiner but in the range of 1¼% to 2%. Accordingly, we must reject Bell's contentions that the allegedly updated Gordon model supports either a 14½ or 12½% return on equity capital.

63. *Third*, Bell claims that a 12½% return on equity is required to maintain Bell's credit standing. Bell's point is that its long-term debt is generally rated at the highest rating of triple A (Aaa) and that it has been able to retain such highest rating in the past by an adequate interest coverage during the period when its debt ratio was substantially lower than the current 45%. However, Bell claims that the combination of an increased debt ratio from (33% in 1966 to 45% today), a current high level of interest rate (7½–8½%), and a low level of earnings has caused a precipitous decline in the interest coverage from 6.3 times in 1966 to 2.9 times by the end of 1970 (on an after-tax basis) and that such a decline must be arrested in order to avoid a substantial degrading of its bonds. Such a degrading, Bell argues, would not only increase its debt costs for both embedded and new debt, but would also restrict the market for Bell bonds and make it difficult for Bell to sell new debt in the volume it requires to finance needed construction. Bell states that a 12½% return on equity is needed to "avert the decline" in coverage and to maintain its coverage "at a level approximating that of the Aaa electrics."

64. The Examiner makes detailed findings on this contention of Bell in paragraphs 30–40 of the I.D. and concluded that Bell has not shown that there is any peril of such a downrating for the Bell System as a whole and that even if this were to happen, "the result would scarcely be dire" (I.D. paragraph 40). We believe that the conclusions of the Examiner should be amplified or modified to make clear that, based upon current and immediately foreseeable financial conditions, it is desirable to arrest the decline in Bell's interest coverage. Although there are factors other than interest coverage that are considered by the rating agencies in grading Bell's bonds, it is clear from the record that any further significant decline in interest coverage could jeopardize the present rating of Bell's long term debt. We are of the opinion that it is desirable for Bell to be able to prevent any substantial downgrading of its bonds. However, the record will not permit a positive finding as to what interest coverage is required to prevent such downgrading. It appears that the required coverage would vary under differing financial and economic conditions. Accordingly, we should make clear that we are making no findings or conclusions as to the magnitude of interest coverage that is required for this purpose.

65. We want to emphasize that we concur with Bell to the extent that it claims that the decline in its interest coverage should be arrested. We believe that it is desirable for Bell to maintain a high rating for its bonds. However, we have difficulty with Bell's claim that it should have the same or greater interest coverage than the Aaa electrics or that an equity return of 12½% is necessary to sustain adequate interest coverage for the Bell System. Bell's claim for a 12½% equity return in this respect is based upon certain calculations it made using an alleged current debt cost of 7½% to 8½%, which we have found to be too high. Under these calculations of Bell a return of the magnitude of 12½% is required to provide an interest coverage of 3.2 to 3.3 which Bell claims is comparable to the coverage of the Aaa electrics. However, for the reasons stated by the Examiner, we are not persuaded that Bell's coverage must be pegged to that of the Aaa electrics. Bell's equity return, in our judgment should be increased to enable Bell, under efficient and economic management, to arrest the coverage decline. We believe that the return we are allowing on equity will be adequate to halt the coverage decline and to prevent any significant degrading of Bell's bonds. Although Bell is entitled to an increased equity earning, Bell has not shown that a 12½% equity return is required to provide adequate interest coverage.

66. *Fourth*, Bell contends that a 12½% return on its equity is justified by the fact that equity earnings of regulated electric utilities was in the range of 12.5% during the period 1966–1969; that many of these electrics are currently seeking even higher equity earnings; that under present conditions the relative risks of Bell's equity are no less than the risks of the electrics on their equity; and that in Docket 16258 we stated that we would give particular attention to the earnings of electric utilities in reviewing Bell's earnings in the future.

67. The Examiner discussed this claim of Bell in paragraphs 48–52 and 64–65 of the I.D. The 45% debt ratio of Bell continues to be significantly lower than the debt ratio of the electrics. Moreover, Bell contends that it should keep its debt ratio at 45½% and should not be

forced to push its debt ratio as high as the electrics. As we set forth hereinafter in our discussion of the appropriate capital structure, we agree with Bell that it should not be forced to push its debt ratio above 45% at the present time. Accordingly, inasmuch as Bell appears to concede that the higher the debt ratio the higher the risk to equity holders, it would appear from this factor alone that at the present time and for the foreseeable future Bell's equity holders are and will be subject to less risk than the equity holders of electrics. We do not believe that, at Bell's debt ratio of 45%, it would be fair or equitable to the rate payers of Bell to require them to pay the additional sums required to enable Bell to earn the same as do the electrics on equity in view of the differences in the percentage of debt. We are not holding that Bell should not have overall earnings comparable to regulated electrics. We shall continue to look to such overall earnings and overall rates of return allowed the electrics as a fruitful basis for our review of Bell's overall earnings in the future. However, for the reasons stated above and by the Examiner, we reject Bell's claim that its equity earnings should be geared at 12½% to match the earnings of electrics on their equity.

68. *Fifth*, Bell contends that in order to attract new equity capital, it must offer investors a return in dividend and market appreciation at least equal to the current dividend of 5% plus an annual growth rate in earnings per share of 6%, for a total of 11% on market value; and that, according to simulation runs by Mr. Scanlon, a 12½% return on book equity is required to satisfy such investor expectations. We concur in the Examiner's findings and conclusions on this claim of Bell as set forth in paragraphs 65–66 of the I.D. Moreover, we take note that the simulation runs were based upon new debt costs ranging from 7–8%, the upper range of which we have found to be too high. We agree with the contention of Bell that Bell's current earnings per share growth, of little more than 2 percent a year, is probably inadequate to enable Bell to attract equity capital on reasonable terms. However, we conclude that Bell has not met its burden of showing that a 12½% return on equity is required to provide an annual growth rate in earnings per share necessary to attract investors.

69. *Sixth*, Bell contends that, since Bell's stock is now selling at close to book value, Bell is not now in a position to raise the large and continuing volume of new common equity capital required by Bell without dilution and confiscation of existing investment; that this situation prevents Bell from maintaining its financial integrity; that a return on equity needed to produce a market price/book value ratio that will not result in dilution is an equity return comparable to the electrics, i.e., 12½%, that in view of the similar price-earnings ratios and alleged similar risks as between the common stock of Bell and the electrics, a return on Bell's book equity of 12½% is required to enable Bell to attract capital.

70. In paragraphs 58–61 of the I.D., the Examiner treats this claim of Bell. He rejects the claim largely because of the alleged failure of Bell to take into account the value of existing stockholders' subscription rights in defining "dilution of equity." However, both the Examiner (I.D. 87) and the Trial Staff make it clear that it is desirable for Bell stock to be marketed at a price above book value and that Bell

has maintained its burden of proof by showing that the present equity earnings of Bell are inadequate to attract capital on fair terms because of the poor market price/book value ratio. We are in agreement with these general conclusions and believe that the increased return on equity stock we are allowing herein would enable Bell to issue stock on terms fair to existing stockholders. However, since Bell's claim for a 12½% return is based upon its contentions, heretofore rejected by us, that the equity holders of Bell and the equity holders of electrics have similar risks, we cannot agree that Bell has proven the need for a 12½% return on equity.

71. *Seventh*, Bell claims that it cannot attract equity capital unless the spread between the cost of current debt and return on equity is maintained at about 5 percentage points; and that, assuming a current debt cost of 7.5%, a 12½% return on equity is required to provide the needed spread to attract investors to Bell's common equity.

72. The Examiner makes findings on this claim, in paragraphs 31 and 73 of the I.D., and concludes that investors consider the risks in equity as justifying a spread of "a *minimum* of 2 percentage points." Bell attacks this conclusion and contends that a spread as low as 2 percentage points is unsupported by any evidence of record.

73. It is our opinion that the record does not support a positive finding as to what the minimum spread should be. We begin with Bell's admission that in general the relationship between equity costs and current debt costs is not precise or linear and that as debts costs rise, the spread between current interest costs and equity costs narrows rather than widens. Moreover, Bell relies upon its earlier contention, which we have rejected, that we found in our 1967 Decision that Bell was entitled to a 10.4% return on equity and that, on the basis of a cost of debt of 5.4%, we must have concluded that there should be a 5-point spread. This was not our finding. Also, we disagree with Bell's implication that a precise percentage point spread can be used as proof in support of a specific equity return. Although we believe that the current debt cost/equity cost spread is pertinent in reaching an overall judgment as to the current cost of equity, we do not believe that a precise relationship can be defined because of the multitude of volatile factors which affect this relationship. We believe that, under the increased equity return we are allowing, Bell can maintain the spread needed to attract equity capital. Accordingly, we reject Bell's claim that it should have a 12½% return on equity to achieve a 5-point current debt-equity return spread.

74. *Eighth*, Bell contends that the evidence presented by the Trial Staff, upon which the Examiner relied heavily, does not justify an equity return of less than 12½%. The Examiner discusses the testimony of witnesses presented by the Trial Staff in paragraphs 67–86 of the I.D. and gives substantial weight thereto in reaching his ultimate conclusion on the cost of Bell's equity.

75. Bell contends that we should not give any weight whatsoever to the testimony of Dr. Myers and Mr. Kosh because, as Bell argues, the return on equity found by these witnesses "clearly contravenes the standards of the Commission's Decision in Docket No. 16258." Thus, Bell states that the 10.5% equity return found by Dr. Myers was approximately the same as the 10.4% which Bell says we allowed in

our 1967 Decision. We disagree with Bell on this point. As we have stated elsewhere herein, we did not make any findings in our Decision in 1967 that the allowable equity return for Bell was 10.4%. To the contrary, we held unequivocably that Bell had not proven its claim at that time that a 10% return on equity should be allowed or would be just and reasonable. Thus, the recommendation by Dr. Myers of a 10.5% return on equity is substantially in excess of the equity return we said would be reasonable and the return actually earned by Bell under our Decision. Similarly, the recommended equity return of 9.75% made by Mr. Kosh cannot be said to be contrary to our Decision in 1967 in that it represents an increase in the actual return on equity from 9.3%, 9.5% and 9.2% realized by Bell in 1968, 1969 and 1970.

76. Bell also argues that the discounted cash flow (DCF) method used by both Dr. Myers and Mr. Kosh underestimates the fair return on book equity. This is because DCF is a method that, by definition, produces a capitalization rate which, if applied directly to book equity, will produce a market price equal to book equity. We agree with this characterization of the definition of the DCF method. However, as both Dr. Myers and Mr. Kosh made clear, the DCF method must be used in conjunction with additional factors for safety, market pressure and other allowances that are essentially matters of judgment. Proper use of these added factors makes the DCF method a useful tool or guide for the Commission to use in the context of the entire record and in applying its informed judgment in determining the fair return for Bell on equity. Accordingly, we reject Bell's contention that we should not consider the testimony and conclusions of Dr. Myers and Mr. Kosh.

77. *Ninth*. Bell claims that the 9.75% return on equity recommended by Mr. Kosh is too low not only because of the use of the DCF method but also because he understated the factors used in calculating the DCF rate and used a hypothetical capital structure of 50% debt. For example, Mr. Kosh used a current debt cost of 7.00% for 1971 and 6.51% in 1972 which we have concluded are too low. Bell also points out that Mr. Kosh conceded that a 9.75% return on equity and a debt ratio of 50% would provide interest coverage of only 2.6 times.

78. To the extent that Mr. Kosh relied upon an assumed current debt cost of less than the 7 25–7.50% we have found herein, particularly in context of the imputed 50% debt ratio urged upon us by Mr. Kosh, his recommended 9.75% return on equity falls short of the current cost of Bell equity. Also to the extent that a 9.75% return on equity will not halt the decline of the interest coverage of Bell from the 2.9 experienced at the end of 1970 we believe that 9.75% is inadequate to maintain the credit of Bell. Accordingly, although we agree with Bell that the 9.75% return recommended by Mr. Kosh is inadequate, the studies and analyses made by Mr. Kosh and his testimony in this case fortify our conclusions that Bell has not supported its case for a 12½% return on equity.

Conclusions on Current Cost of Equity

79. In the preceding paragraphs we have made it clear that, although it is our judgment that Bell has proven the need for a higher return on equity, it has fallen short in demonstrating that the return should be as high as 12½%. None of the contentions by Bell individually or collec-

tively, support such a return. In arriving at our conclusion as to the allowable return on Bell's common equity, we have given careful consideration to the Examiner's recommendations, all testimony and other evidence of record, proposed findings, briefs, exceptions and *en banc* oral arguments herein.

80. The Examiner relies substantially on the testimony of Mr. Kosh and Dr. Myers and recommends an allowable return on equity ranging from 10% to 10.5%, with 10.3 % being used for computation purposes; the Trial Staff, also relying largely upon the same testimony, recommends an equity return ranging from 9.75% to 10.25%; USITA recommends the 12.5% equity return as requested by Bell; and the Secretary of Defense recommends no change whatsoever in Bell's allowable overall rate of return and thus, in effect, urges a reduction in Bell's return on equity.

81. We agree with the Examiner and the Trial Staff that the studies made by Mr. Kosh and Dr. Myers, their analyses on the record herein and their recommendations offer the most fruitful basis for us to use in applying our informed judgment in arriving at the proper equity return for Bell. Although we find Mr. Kosh's studies and testimony to be helpful in our evaluation of Bell's claims and in arriving at our conclusions herein, we agree with the Trial Staff that the ultimate recommendation by Mr. Kosh for a 9.75% equity return is too low. We discuss the reasons for our rejection of Mr. Kosh's recommendation in preceding paragraphs 65–66.

82. On the other hand we do not find the same shortcomings in Dr. Myers' recommendation that we have found with respect to Mr. Kosh. Dr. Myers made a study of the past performance of Bell common stock in comparison with the market as a whole. He contrasted the volatility of AT&T's price changes with the market as a whole and concluded that Bell's stock has significantly lower market sensitivity (.7 as against 1.0) than the market as a whole. He also studied the total yield on a large number of stocks during different intervals of time and concluded that investors are today expecting a return of 10–12% from an "average" equity security. He further concluded that, inasmuch as Bell's equity is less risky than the average, Bell should be allowed an equity return in the lower part of this 10–12% range which, in his judgment, should be fixed at 10.5%. In arriving at his recommended 10.5% return on equity, it is significant that, unlike Mr. Kosh, Dr. Myers assumed a current debt cost of 7.25% which prevailed at the time he prepared his testimony. Although this cost had risen to 7.625% by the time Dr. Myers was cross-examined on the record, the 7.25% is at the lower end of the range of 7.25–7.50% current debt costs which we have found based upon actual costs in 1971 and 1972 to date. Therefore, we believe that Dr. Myers' recommendation of 10.5% return on Bell's equity is entitled to substantial weight.

83. The Examiner does not indicate any specific basis for his conclusion that the lower figure of 10.3% should be used by him for computational purposes unless it is in recognition of the arguments made by the Trial Staff that Dr. Myers overstated Bell's cost of equity. However, the Trial Staff does not provide any factual basis for questioning Dr. Myers' recommendation of 10.5%. In its proposed findings of fact (page 96), the only statement made by the Staff is that "it is the staff's

considered judgment that Dr. Myers' recommended return of 10.5% for book equity is too high and should not be used as a basis for computing the respondents' overall rate of return." This statement constitutes the Trial Staff's complete finding of fact upon which it relies for rejecting the 10.5% return recommended by Dr. Myers. There is no record citation to support this "judgment." This is an inadequate proposed finding of fact and offers no basis for us to use in rejecting the recommendation of Dr. Myers. Later, in its proposed "conclusions" (page 162) the Trial Staff again states "we believe that Dr. Myers overestimated and overstated the cost of equity, primarily by failing to give enough weight to the stability of respondents' earnings and the reduced risk factor resulting therefrom . . ." However, the Trial Staff makes no factual showing that Dr. Myers did not give enough weight to such earnings stability and reduced risk factor in arriving at his market sensitivity index of .7 for Bell or in making his judgment that Bell's equity return should be at the lower end of the 10–12% range of return expected by investors. No questions appear to have been raised on the record with Dr. Myers by the Trial Staff or others to lay any foundation for arguing that Dr. Myers did not give enough weight to these matters.

84. There are many techniques for producing useful factual information as a basis for determining the equity return which should be allowed in the computation of the overall fair rate of return. We have discussed in the preceding paragraphs the evidence of record in this proceeding regarding most of the specific measurements that are normally used in attempting to quantify the return required for equity capital and have stated our views with regard thereto. However, in the final analysis, large areas of judgment must be applied to each of the measurements used. Therefore, while not attempting to make specific findings with regard to each measurement, we find that it is reasonable to conclude that, on the basis of the evidence in this record and the subsequent factual information of which we have taken official notice, 10.5% is the minimum return on equity required by Bell. We shall discuss later the composition of costs of preferred and common equity which comprise this 10.5%. (Para. 90)

Conclusions on Capital Structure

85. We turn next to the question of whether we should make our overall rate of return determination herein on the basis of Bell's actual current or reasonably foreseeable future capital structure or on the basis of some theoretical or hypothetical structure. We have heretofore held that, since the overall rate of return is affected by the proportion of debt and equity, Bell has "the obligation to fix this proportion in such a way as to raise the required capital at the lowest possible cost consistent with overall responsibility to provide modern, efficient service at reasonable rates and to maintain the financial integrity of the enterprise" and that a balance must be struck which, "on the one hand, obviates the risks inherent in too much debt, and on the other hand avoids the unduly high charges to the public and adverse effects upon stockholders from too little debt" (9 FCC 2d, page 52). Thus, if we should find on the basis of the record herein that the

present or immediately foreseeable capital structure of Bell is or will be unsound and so out of balance as to impose unduly high charges upon the rate payers, we could act to correct such imbalance by computing the cost of capital herein on the basis of a theoretical or hypothetical capital structure which we would determine to be sound and in proper balance as related to rate payers and investors.

86. None of the parties herein take the position that we should determine the cost of capital on any capital structure other than Bell's long term debt ratio of 45%. It is true that the Trial Staff urges that, at some indefinite time in the future, Bell should move to a 50% debt ratio. However, the Staff uses the actual debt ratio of 45% rather than 50% in making its cost of capital computation and we therefore assume that the Trial Staff recommends that we do likewise.

87. The Hearing Examiner takes a different tack. After concluding that it would be safe and reasonable for Bell to maintain a debt ratio in the range of 48% to 52%, the Examiner utilizes a hypothetical debt ratio of 48% in his computation of Bell's overall cost of capital. He justifies this by concluding that Bell should not have sold $1.38 billion of preferred stock in June, 1971, at a cost of 8%, but instead should have sold debt at a cost presumably lower than 8% and that, if this had been done, Bell's actual debt ratio would have been 48% rather than 45% and the rate payers would not have been required to bear the additional burden of the higher preferred stock cost.

88. We believe that the Examiner erred in using a theoretical 48% debt ratio in his computation. First, he erroneously assumed in his calculation that the $1.38 billion of theoretical debt could have been sold at the embedded debt cost of 6% rather than at some higher figure consistent with our findings that the actual debt cost to Bell in 1971 averaged 7.49%. Second, we think that Bell's reasons for selling $1.38 billion of preferred stock rather than debt in June, 1971, were plausible, namely, that Bell believed that the issuance of additional debt would have caused a further decline in Bell's interest coverage and that the issuance of common stock at that time would have been unreasonable in view of the then prevailing unfavorable market price to book value ratio.

89. Bell has done that which we urged it to do in our 1967 Decision by increasing its debt ratio substantially from 33% to 45%. Bell sets forth plausible reasons to support its judgment that the debt ratio should not go above 45% (see App. A, pages 6–7). Since 1966 Bell has not only increased its debt ratio but has made substantial use of short-term debt, commercial paper and intermediate-term debt; it has issued convertible preferred stock in lieu of more expensive common stock, and it has issued warrants for common stock for future expansion of equity capital. We believe that these actions demonstrate a careful and responsible effort on the part of Bell to explore all rational modes of financing and reflect reasonable efforts to "strike a balance" between the risks inherent in too much debt and the adverse effects on the rate payers and stockholders of too little debt. Accordingly, we find no sound basis for us to conclude that we should use a debt ratio other than the debt ratio of 45% in our determination of the fair rate of return herein. This is not to say that we disagree with the Trial

Staff or the Examiner that it would be safe, prudent or perhaps more economical for Bell to go to a 50% debt ratio or more at some time in the future. Nor do we necessarily agree with Bell that a range of 40–45% debt is appropriate. The Trial Staff and the Examiner may be correct in their views as to a 50% debt ratio. However, the initial determination of such financial planning rests with Bell subject to our review and we expect Bell to carry out its financing program in the future by fixing the proportions of debt, both long-term and short-term, and equity, including preferred stock, in such a way as to avoid unduly high charges to the public. All that we are deciding herein is that we agree with all of the parties that expressed a position therein that we should use Bell's actual debt ratio of 45% for determining Bell's cost of capital rather than a hypothetical structure such as that used by the Examiner.

Overall Rate of Return

90. We have found that for the purpose of determining Bell's overall rate of return, the embedded debt cost is 6%; that the minimum cost of Bell's equity for the present and immediately foreseeable future is 10.5%; and that the appropriate capital structure to use in determining Bell's overall cost of capital includes debt at a ratio of 45% to the total capital. We have not specified as yet our findings as to the effect of the inclusion of preferred stock in the capital structure on the cost of common equity and on the total cost of capital. Bell contends that if preferred stock is considered as a separate layer of capital at a cost lower than the overall cost of equity, then an upward adjustment should be made in the cost of common in recognition of the additional fixed charges ahead of common equity. We do not disagree with this contention in principle and we have taken this into account in arriving at 10.5%, as the allowable return on total (preferred and common) equity. Giving consideration to the 8% cost of convertible preferred issued in June, 1971, we conclude that with the inclusion of this preferred in the capital structure, 10.7% is appropriate as the minimum return we should allow for common equity. We should stress, however, that we do not believe the record in this case supports the conclusion that the total cost of equity capital remains unchanged regardless of the proportions of preferred and common. We believe that Bell has the opportunity to increase the earnings on common by judicious use of preferred financing and at the same time provide a beneficial effect on its overall revenue requirements and thus to the rate paying public. It is our view that there may be combinations of preferred and common which will provide some increase in earnings on common with a lower total cost of equity. We believe Bell should explore this possibility although as we stated in paragraph 89 the initial determination of financial planning rests with Bell.

91. Consistent with our findings on the cost of capital to Bell, the indicated minimum overall return on Bell's interstate and foreign service would be as follows:

Item	Proportion of capital (percent)	Cost rate (percent)	Proportion of total cost (percent)
Debt	45	6.0	2.70
Total equity	55	10.5	5.78
Total cost (including convertible preferred)			8.48
Use			8.5

This minimum 8.50% overall return contrasts with the minimum of 7.75% return recommended by the Trial Staff (using a 45% debt ratio and a range of 7.75–8.25%) and the minimum of 7.9% return recommended by the Examiner (using a 48% debt ratio and a range of 7.9–8.8%).

92. We are aware of Bell's contention that the 8% cost of the convertible preferred does not include the costs of financing. However, the record does not show what these added costs are and we do not believe that the amount thereof, if added, would significantly affect the required rate of return. In any event, we are allowing a sufficient margin in the rate of return to cover a reasonable amount for costs of financing this issue. Bell also contends that this stock is transitory, in that it will be replaced by common equity and that, therefore, the cost should be considered the same as the cost of common. Bell submitted no studies or factual data as to whether, or to what extent, this conversion may take place in the near future. We assume there will be some conversion and we have taken that possibility into account in our determination of the allowable rate of return. Furthermore, in view of our finding as to the cost of preferred and common equity, we do not believe the total rate of return required by Bell will be materially affected by any such conversions.

93. The Trial Staff contends that the overall return allowed in this case should reflect downward adjustments based upon alleged "unwarranted and unjustified current costs resulting from the improper capital structure and errors in the construction program for 1966 through 1970." Thus, the Trial Staff first determined that Bell's indicated rate of return should be 8–8.25% and then concluded that the lower end of the range of the allowable overall return for Bell should be reduced at least ¼ of one percentage point because of the alleged "inefficiencies, mistakes and ultra-conservatism."

94. With respect first to Bell's alleged "ultra-conservatism" concerning its capital structure, the Trial Staff centers its criticism on Bell's past financial policy which led to the reduction of its debt ratio from 51% in 1948 to 35% in 1954 and in maintaining the debt ratio at approximately that low level until our Decision in 1967 in Docket 16258. Thus, the Staff makes the point that Bell, unlike the electrics, maintained low debt ratios when interest rates were low and when it should have increased its debt component at low cost and thereby benefit both the rate payers and the equity holders. We do not disagree that, as the result of its historical financial policies, Bell's present actual cost of both debt and equity is greater than it might otherwise have been. However, this particular past policy of Bell and its effect on Bell's cost of capital was given careful consideration in

our Decision in 1967 in Docket 16258. We concluded at that time that continuation of such policy would unduly increase the cost of service to the users. In fixing the rate of return to be allowed (7–7½%) we gave appropriate weight to the extraordinary amount of risk insurance that such low debt ratio policy had given to AT&T's stockholders. We also found in 1967 that Bell should go to a debt ratio above 40% in the interest of rate payers, investors and Bell (see 9 FCC 2d, pages 62–63; 83–85). Bell has acted in conformance with our Decision and has increased its debt ratio to 45%. Under these circumstances, we would not be warranted in going beyond our 1967 Decision by making downward adjustments in the otherwise required rate of return so as to penalize Bell for the conservative financial policies it followed over the years with Commission acquiescence.

95. With respect to the allegations of "inefficiencies," "mistakes" and "errors in the construction program for 1966 through 1970," the criticism of the Staff centers around its contention that Bell did not time its expenditures properly; that Bell should have spent about $1 billion more on construction in the period 1966–68 when interest rates were low (about 6%) and $1 billion less in 1970, when interest rates were high (about 8.73%). The rationale of the Trial Staff is that Bell's actual construction expenditures in 1966–68 were too low because of a deliberate policy on Bell's part during this period to cut down on the margin of operating capacity and to decrease the relative amounts expended in the service improvement category. According to the Staff, the consequences of this policy were twofold. First, by cutting construction in 1966–68 below the relative level prevailing prior thereto, the Staff contends that Bell in effect invited the service difficulties that began to emerge in 1968 in such locations as New York, Miami and Boston, and that Bell should have foreseen that such slow-down in construction in 1966–68 would result in such service problems. Second, in order to overcome these difficulties, Bell embarked upon a hurriedly planned and disproportionately greater construction program in 1969–70 that had adverse cost consequences.

96. The Staff elaborates on the foregoing by contending that Bell's failure to plan properly resulted in costs being incurred in 1969 and 1970 that were excessive; that the rate base was correspondingly inflated; and that the rate payers should not be required to pay for such inflated rate base. However, instead of recommending a reduction in Bell's rate base, the Staff recommends that this inflated rate base be considered as a factor in fixing Bell's allowed rate of return. Furthermore, the Staff contends that in addition to inflating the rate base unnecessarily, this alleged improper planning meant that if Bell had obtained $1 billion additional debt capital to finance the needed additional construction in the 1966–68 period when interest rates were low, there would have been no need for Bell to sell $1 billion in debt in 1970 at 8.73% to finance the catch-up construction. Thus, the Staff asserts that the current embedded debt cost of Bell was unnecessarily increased; that the rate payers should not be required to pay these unnecessarily increased costs of embedded debt and that an additional downward adjustment should be made in the overall rate of return allowed Bell to compensate for this unnecessary cost of capital.

97. The Hearing Examiner treated these contentions of the Staff in paragraphs 86, 89–98 and 105–06 of the I.D. He concluded that the proposal of the Staff to reduce the allowable rate of return of Bell would, in effect, constitute a penalty that would be self-defeating since decreasing the allowable rate of return in his view would impair Bell's ability to attract needed capital for the provision of adequate service to the public.

98. We are in agreement with the Examiner's ultimate conclusion that no downward adjustment should be made in the allowable rate of return to compensate for the alleged inflated rate base. It is our opinion that, notwithstanding that the record herein may support findings that Bell's management underestimated Bell's future construction requirements and miscalculated future service demands as proven by later events, we would not be warranted on this record in reducing the otherwise required rate of return in order to compensate for such alleged inflated rate base. The Staff has not quantified the extent that it claims that the rate base has been inflated. Moreover, Bell argues that its rate base is not inflated; that Bell would have had to incur these 1969–1970 costs in any event; that such costs were not the result of under-construction in 1966–68; that Bell did not need a higher level of construction in 1966–68 because it was meeting growth needs through technological improvements, such as increases in capacity of the TD–2 radio relay system; and that the Trial Staff is attempting to penalize Bell for its efficiencies and technological improvement in 1966–68. We agree with the Examiner that the evidence of record on this subject is incomplete and inadequate for us to make findings that there are excessive costs in Bell's rate base. We believe that this question should be pursued in Phase II. Our action herein is without prejudice to the making of any adjustments in Phase II in the rate base as may be justified on the record at that time. We hold only that we will not make any adjustment at this time in the allowable rate of return because of the alleged inflated rate base.

99. With respect to the other claim of the Trial Staff we do not think that it necessarily follows that Bell's current cost of capital would be less today if Bell had spent $1 billion more on construction in 1966–68 and $1 billion less in 1969–70. The Staff bases its claim on the assumption that Bell would have raised $1 billion in debt in the earlier period at a cost of 6% and that this would have obviated the necessity to sell $1 billion debt in 1970 at a cost of 8.73%. However, the Staff overlooks the fact that Bell would have had the option of raising the additional $1 billion in 1966–68 by the issuance of common equity at a cost in excess of 8.73% which would have made the current cost of capital greater than it is today because of the higher cost of equity in 1966–68 compared to debt in 1969–70. Such action by Bell would have been consistent with the proposed findings by the Staff that, if Bell had sold more equity in the 1966–69 period Bell's interest coverage would not have declined as rapidly as it did and that Bell could have moved more slowly toward a 45% debt ratio and issued common equity during this period when the market price/book value was favorable. Accordingly, we reject the Staff's further contention that the overall rate of return should be adjusted downward because of the alleged unnecessary increase in the current cost of capital.

100. We are aware of the magnitude of the effect on the carrier's cost which can result from overestimating or underestimating facility requirements and the plant construction needed to meet those requirements. The Bell System's construction program is of major concern to this Commission from the standpoint of its effect on cost of service as well as its effect on quality of service. We wish to make clear, therefore, that since the management of the construction program can have a direct effect on rate base and operating expense it will not only be considered further in Phase II of this docket, but will continue to be the subject of our continuing program of analysis and review of Bell's operations.

101. The Trial Staff recommends a further downward adjustment in Bell's rate of return on its interstate and foreign communications services to compensate for AT&T's earnings from Western Electric. AT&T owns all the equity of Western Electric. Its return on its investment in Western Electric was 11.59% in 1970; 10.07% in 1971; and 9.83% for the first nine months (annualized) of 1972. The Staff asserts that we should take into account the actual return received by AT&T from its investment in Western Electric in determining how much in the way of earnings must be contributed by interstate and foreign communications to meet the total earnings requirement of AT&T. In the simplest terms, the Staff states that if a utility with two lines of business has a total earnings requirement of $100 and earnings of $5 from one line of business, then the earnings contribution of the other line of business has to be $95. Thus, the Staff contends that an overall rate of return of 8.00% for AT&T is satisfied by the 11.59% return of AT&T's investment in Western Electric (based on 1970 figures) and a 7.8% return on investment to furnish interstate communications services.

102. Bell does not deny the validity of the Trial Staff's position. However, Bell contends in its Reply Brief that ". . . issues relating to Western Electric prices and earnings are clearly Phase II issues and it would not be proper to make the basic economic decision in the form requested by the Trial Staff on the basis of a fragment of cross-examination in Phase I in which the subject of Western Electric prices and earnings is not in issue."

103. We agree with the Staff that it would be appropriate for the Commission to take into account the return received by AT&T from its investment in Western Electric in determining the rate of return for interstate and foreign communication service. However, we are not prepared on the basis of the limited record in this case to make the specific adjustment recommended by the Staff. We believe that this question warrants a thorough examination in Phase II which deals, among other things, with all ramifications of the relationship of Western Electric to the Bell System and its effect upon telephone rates and revenue requirements. Accordingly, we conclude that it is not appropriate for us to make any adjustments in Bell's rate of return with respect to Western Electric's earnings in this proceeding.

Conclusions on Rate of Return

104. We have carefully considered the testimony of all witnesses, all evidence of record and facts officially noticed herein, all briefs

and arguments of all parties and the Examiner's I.D. We have agreed with the parties and have concluded that, for purposes of determining the rate of return herein, the embedded cost of debt for Bell is 6% and that the appropriate capital structure for us to use is a structure with debt at 45%. As heretofore stated, we have found that Bell's current cost of equity capital is higher than that found by the Examiner and the Trial Staff and lower than that claimed by Bell. Thus, after thorough review of the evidence and arguments of the parties, we find that Bell's common equity cost for the present and immediately foreseeable future is 10.5%. Based upon our findings on these conventional factors, the indicated rate of return for Bell is 8.50%. However, we further considered carefully and rejected the contentions of the Trial Staff that the indicated return for Bell should be reduced to take into account Western Electric's earnings and certain alleged errors, mistakes and imprudent planning by Bell in its financing and construction programs.

105. In view of all of the foregoing, we are of the opinion and so conclude that the fair rate of return to Bell on its interstate and foreign communication services is 8.5%. We consider that this return is the minimum required by Bell to enable it to attract capital at a reasonable cost and to maintain the credit of Bell; and to assure continued, adequate and safe interstate and foreign communications service to the public and to provide for necessary expansion to meet future requirements.

106. The Examiner places considerable emphasis upon his recommendation that the Commission adopt the "conscious use of regulatory lag" in conjunction with his recommended wide range of overall fair rate of return (7.9%–8.8%). The Trial Staff, although objecting to the "conscious use of regulatory lag," proposes a narrower range (from 7.75% and 8.25%).

107. We believe that we should adopt an appropriate range of return by which to measure the reasonableness of Bell's future earnings and revenue requirements. Inasmuch as we have found that the minimum rate of return that Bell should be permitted to earn on its interstate operations at this time is 8.5%, we are allowing Bell to file rates designed to produce such return. However, it is our view that if Bell is able, through improved efficiency or productivity gains, for example, to increase its earnings under such rates within a reasonable range above 8.5%, we should consider such increased earnings to be acceptable without regulatory action on our part. As to what this reasonable range should be, we agree with the Trial Staff that the range of .9 of one percentage point recommended by the Hearing Examiner is too broad. The .5 of a percent range recommended by the Trial Staff is in keeping with the .5 percent range we adopted in our 1967 Decision in Docket 16258. Accordingly, with due regard for all of the factors heretofore discussed, we shall specify a range of 8.5–9.0% as the range of reasonableness for the earnings of Bell on its interstate operations at the tariff rates we are allowing Bell to file herein. This is done with the understanding that an earned rate of return within this 8.5–9.0% range at these tariff rates would be considered by us to be reasonable. We believe that this is in keeping with the objectives of the

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economic policies of the Administration and the rules of the Price Commission to limit price increases on utility services to the absolute minimum and to encourage improved operating efficiency and productivity as an appropriate means of increasing earnings.

MCI Petition for Reconsideration

108. As we have noted (see paragraphs 7 and 8), MCI requested reconsideration of our action released herein on June 29, 1971, (31 F.C.C. 2d 503). In that action we partially granted a clarification petition by the Trial Staff and ruled that, after we made our Phase I decision herein on rate of return, we expected AT&T to prepare an appropriate specific rate adjustment for its interstate services and that such rate proposal would be subject to review and further action by the Commission. We pointed out that, since the parallel proceedings in Docket 18128 were concerned with the principles that should govern in the assignment of the Bell System's revenue requirements among its principal classes of services, any rate adjustments made on the basis of our rate of return ruling would be interim in nature and subject to final decision in Docket 18128. Accordingly, we further ruled that any such rate proposal by AT&T will be subject to an accounting order by the Commission with possible refunds pending the outcome of Docket 18128.

109. MCI objected to the action we took and urged us to reconsider and hold that irrespective of what we may decide herein on rate of return, AT&T may not submit any rate proposal until Docket 18128 is decided or, alternatively, that any rate increase proposal submitted by AT&T on the basis of our rate of return allowance shall be effectuated only by increasing charges for all interstate services proportionately, subject to an accounting order. MCI's petition presents no new questions that were not carefully considered by the Commission at the time of its Decision. As we have concluded herein, Bell is entitled to a higher rate of return on its interstate and foreign communication services. We believe that it should be permitted to submit a rate proposal that would enable Bell to increase its earnings to the level hereinafter set forth. In view of the demonstrated need of Bell for increased earnings to attract capital on reasonable terms and to maintain its credit, we see no sound reason to defer any increased rates until after we decide Docket 18128. Moreover, we do not believe that we should make it mandatory that AT&T's interim rate proposal shall increase charges for all services proportionately. Bell must make the initial decision as to the proposal it will submit. However, as heretofore stated, we expect Bell to submit an interim rate proposal that will be consistent with sound rate-making principles and Bell will be expected to support its proposal. MCI and other parties herein will have an opportunity to submit written comments on whatever interim rate proposal is submitted.[3] Accordingly we shall deny MCI's petition.

Price Commission Regulations

110. On May 26, 1972, the Price Commission issued new regulations, effective June 1, 1972, applicable to "interim" rate increases by Public Utilities. These rules define an "interim rate" as "an increased rate al-

[3] We anticipate that such interim rate proposals will apply to those services particularly affected by increased costs, such as operator assisted calls.

lowed to go into effect by operation of law, or by action or inaction of a regulatory agency, pending a final determination by that agency on the requested increase" 6 C.F.R. 300.16a(a)(1). The question arises as to the applicability of these rules to the rate increases that we are allowing herein.

111. Inasmuch as the currently effective MTS rates went into effect January 26, 1971, substantially prior to the August 15, 1971 freeze date under the new economic program, it appears that none of the Price Commission rules apply to such rates. However, with respect to our decision herein to permit Bell to propose further increases in rates, it appears that any such increased rate proposal by Bell could not be put into effect except upon compliance with the Price Commission rules. This is because we propose to allow such increased rates to go into effect pending a final determination of the lawfulness thereof in Phase II hereof and in Docket 18128.

112. The pertinent rules of the Price Commission specify that, before an interim rate may go into effect, the regulatory agency must suspend the rate for the maximum period authorized by law. In addition, the utility must certify in writing to the regulatory agency (copy to the Price Commission) that (i) the increase is cost-justified and does not reflect future inflationary expectations; (ii) the increase is the minimum required to assure continued, adequate and safe service or to provide for necessary expansion to meet future requirements; (iii) the increase will achieve the minimum rate of return needed to attract capital at reasonable costs and not to impair credit; (iv) the increase does not reflect labor costs in excess of that allowed by Price Commission policies; and (v) the increase takes into account expected and obtainable productivity gains, as determined under Price Commission policies. Further, the utility must furnish the Price Commission proof of newspaper publication of notices of such interim rate requests and of procedures for public requests for proceedings thereon 6 C.F.R. 300.16(a)(c).

113. In view of our action herein permitting interim rate increases that are below the level of those that were filed with us in November, 1970 and deferred by AT&T until now at our request, we believe that the Price Commission's general requirement of maximum suspension of interim rate increase proposals has been met in the case. Moreover, our decision herein constitutes sufficient basis for AT&T to submit the written certification required as to criteria (i), (ii) and (iii) above. It appears that Bell can certify with respect to criteria (iv) and (v) from factual information furnished by Bell even though this decision does not contain specific findings with respect thereto since these criteria concern matters more closely related to Phase II of our investigations. Bell's counsel at the September 19, 1972 Oral Argument stated that the Price Commission policy with respect to wage increases was satisfied because the increased costs represented by wage increases were required by contracts which were ratified before the date specified by the Price Commission policy; and that the Price Commission's policies with respect to productivity do not come into play because Bell's support for the rate increase is based on actual results for a past period and do not include any additional costs for the future. It is our view, therefore, that the Price Commission's regulations applicable to the

rate increase we are authorizing Bell to file will have been complied with when Bell files the appropriate certification.

Exceptions to Initial Decision

114. Numerous exceptions to the Initial Decision of the Hearing Examiner have been filed by the parties. We have clearly indicated herein the basis for our decision and the extent to which we are in agreement or disagreement with the findings and conclusions of the Examiner. In arriving at our decision we have given careful consideration to all exceptions and briefs in support thereof and to argument and re-argument thereon. Thus, to the extent that the exceptions to the Initial Decision are in accord with our findings and conclusions herein, they are granted and otherwise denied. Further, we shall issue in the very near future a supplement to our order herein in which we shall indicate our disposition of each individual exception that has been properly made by the parties.

IV. Operating Results and Revenue Requirements

115. To determine the dollar amount of any rate adjustments required to effectuate the rate of return found herein to be reasonable; we must find the going level of Respondents' interstate earnings. Respondents submitted for the record certain interstate operating data for the years 1969 and 1970 based on actual operations and their projected view for the year 1971 as shown below:

Bell System Interstate Data

[Millions except for items (2) and (6)]

	1969	1970	1971 view
(1) Messages	2,473	2,714	3,020
(2) Average revenue per message	$1.87	$1.81	$1.85
(3) Total revenues	$5,011	$5,276	$5,931
(4) Total expenses	$4,002	$4,352	$4,896
(5) Average net investment	$11,285	$12,296	$13,605
(6) Earnings ratio (percent)	8.1	7.5	7.7

The above 1971 projection data do not include the effect of the Ozark Separations Plan adopted by the Commission in Docket No. 18866 and which became effective January 1, 1971 nor the increased MTS rates which became effective January 26, 1971. The net effect on the earnings ratio of these two actions (0.5% decrease for Ozark and 0.95% increase for the rate revision) would be to increase the earnings ratio to 8.15% for the 1971 projection. Respondents stated that their 1971 view was based on a forecasted upturn in business over that experienced in 1970 and that if the upturn did not materialize and expenses increased in 1971 as much or more than revenues, the 8.15% projected earnings ratio would not be realized. We note also that the 1971 view was based upon projected wage increases using the average wage increases for the prior three years, whereas the actual wage increases which became effective in mid-1971 were substantially in excess of that average. However, during the hearings and in their proposed findings and briefs, Respondents maintained their view that an earnings level of 8.15%

was appropriate to use for the year 1971 and in the Oral Argument before the Commission in October 1971, Respondents' spokesman expressed their view that the interstate earnings level would be 8.1% for 1972 assuming the economy responded as they hoped it would.

116. The Trial Staff recommended the use of a going level of interstate earnings of 8.29% for the computation of any required rate revisions. This figure was derived by annualizing the first four months (February–May 1971) of actual operating experience following the rate increase, the latest data then available. Both the Examiner and Respondents have noted serious defects in this method of computing the going level of earnings from interstate operations. Perhaps the major defects are (1) the failure to reflect any wage increase when it was known that negotiations were under way at that time to provide for increases in wages in mid-1971, and (2) the annualization of a four month period without taking into account seasonal variations and short-term fluctuations in business activities. However, it is not necessary to review in detail the merits of the projections of either the Trial Staff or the Respondents for the year 1971 since we now have available the actual results of interstate operations for the year 1971 and for the first nine months of 1972, as well as further estimates of operating results for the year 1972 provided by Respondents at the Oral Argument before the Commission. We will, therefore, take official notice of actual interstate operating results since the close of the record and analyze the trends since January 1971 for the purpose of reaching a determination as to the going level of earnings in order to compute the increase in rates required to enable Bell to reach the rate of return we have allowed.

117. Annualized earnings ratios for the Bell System's interstate operations since the beginning of 1971 are as follows:

	Percent
1st quarter 1971	8.16
2nd quarter 1971	8.45
3rd quarter 1971	7.29
4th quarter 1971	7.58
Year 1971	7.86
1st quarter 1972	7.56
2nd quarter 1972	7.97
3rd quarter 1972	7.62
9 months ended 9–30–72	7.72
12 months ended 9–30–72	7.69

As indicated heretofore, the actual wage increases which became effective in mid-1971 were substantially higher than the estimates which were used in Bell's projection. This would account, in part, for the failure, as indicated by the foregoing earnings ratios, to achieve the 8.15% return reflected in Bell's 1971 "view." However, it also appears from an analysis of actual interstate operating results for the year 1971 that the forecasted upturn in business, upon which Respondents relied in making their 1971 projection, did not fully materialize. For example, the actual 1971 interstate message volume increased 6.8% over the 1970 message volume, compared to the projected message volume increase of about 9.2%. Likewise, the average revenue per message for 1971 was $1.91 compared to Respondents' "view" of the $1.95 adjusted for the January 26, 1971 rate increase.

118. Although the foregoing earnings ratios are helpful for analysis purposes, they cannot be used without adjustment as indicative of the present going level of interstate earnings. The ratio of 7.62% for the third quarter of 1972 does reflect the wage increases which became effective in mid-1972, but as noted by Respondents in their objections to the Trial Staff's annualization of four months of operating data, there are "statistical hazards" in the annualizing process. Also, while the 7.69% ratio for the 12 months ended 9–30–72 is on an annual basis it encompasses only one quarter of 1972 when the mid-1972 wage increases were in effect. However, consideration of these earnings ratios with the trends in message volumes and average revenue per message enable us to reach conclusions as to the going level of interstate earnings with a reasonable degree of confidence. In reaching such conclusions, we have also taken account of the trends in investment and expenses, including the additional wage increases due in mid-1972.

119. There appears to be some improvement in the growth rate in messages in 1972 as reflected by an increase of 10.3% in the first nine months of this year over the same period of 1972 compared to the 6.8% growth for the year 1971. The average revenue per message (ARPM) was $1.91 for the year 1971 compared to an ARPM of $1.81 for 1970. However, the entire increase of 10 cents would be accounted for by the January 1971 rate increase rather than increases in the average distance and average conversation time per message. Over the past several years increases in these two factors have caused the ARPM to trend upward. The ARPM for the first nine months of 1972 remained at $1.91, but this represents a one cent increase over the same period in 1971. Although this improvement is not sufficient to enable us to predict with confidence a resumption of the customary growth rate in the ARPM it does indicate that some growth can be anticipated in the immediately foreseeable future.

120. The trends in expenses and plant investment are more difficult to analyze because of the effect of the change in separations procedures which became effective January 1, 1971. The analysis of expenses is further complicated by the effects of wage increases in mid-1971 and mid-1972 and the service problems encountered by Bell in 1970 and 1971. Without attempting to quantify the specific trends, we are of the view that the operating data do indicate an upward trend in the growth rate in expenses, particularly because of the wage increases, and a slight increase in the growth rate in plant investment. However, we believe that the improvement in message volumes and ARPM will be sufficient to offset these trends so that there will be some improvement in interstate earnings over the level achieved in the first nine months of this year.

121. On the basis of our analysis of the recent operating results data, it is our judgment that the earnings level for the immediately foreseeable future will be about 8.0% and we will use this ratio for computing Bell's additional interstate revenue requirements. Based on Bell's current average net investment devoted to interstate and foreign operations, about $29 million additional net income before Federal income taxes is required to increase Bell's interstate earnings ratio by one-tenth of one percentage point. Thus, achievement by Bell of the 8.5% rate of return on its interstate operations we have found herein to be

appropriate, will require upward rate adjustments which will produce $145 million. Therefore, we will allow AT&T to submit proposed rate changes designed to produce $145 million in additional net income before Federal income taxes giving due consideration to any anticipated cost savings and adjustments in settlements with the non-Bell telephone companies which will result from the increased rates. In light of all of the foregoing, Bell's proposed rates which were filed November 20, 1970 (Transmittal No. 10989) and which were predicated on a rate of return objective of 9.5% will be cancelled.

V. Order

122. Accordingly, IT IS ORDERED, That effective 30 days from the release date of this Order, the tariff revisions to AT&T's Tariff F.C.C. No. 263, filed November 20, 1970 and indefinitely postponed by AT&T pending our decision herein on rate of return, ARE CANCELLED and stricken from the tariff as NULL AND VOID;

123. IT IS FURTHER ORDERED, That within 30 days from the release date of this Order, AT&T may submit for Commission review, a proposed rate schedule or schedules consistent with our foregoing decision which shall be accompanied by the showing required in paragraph 109 and the certificate referred to in paragraph 113 of our decision;

124. IT IS FURTHER ORDERED, That such rate increase proposal which the Commission may allow to become effective shall be subject without further order of the Commission to the same accounting and refund provisions heretofore applicable to the currently effective MTS rates that were suspended and set for hearing herein in our Order of January 21, 1971, 25 F.C.C. 2d 151 and to such findings as we may make in Phase II hereof and Docket 18128;

125. IT IS FURTHER ORDERED, That all exceptions to the Initial Decision that are in accord with our findings and conclusions herein are GRANTED and otherwise DENIED.

Federal Communications Commission,
Ben F. Waple, *Secretary.*

APPENDIX A

Bell System's Testimony and Data

Identity of Witnesses

1. The Bell System, having the burden of proof (27 F.C.C. 2d at 163), presented witnesses who undertook to show that a rate of return of at least 9½ percent was required under current conditions. This evidence included: a review of the Bell System's policy with respect to earnings and capital requirements by Mr. John D. deButts, Vice Chairman of AT&T's Board of Directors; a review of trends in general economic and financial conditions by Dr. James J. O'Leary, Vice Chairman of the Board and Chief Economist of United States Trust Company of New York; testimony on current financial markets and investor requirements by Mr. Robert H. B. Baldwin, a partner in Morgan Stanley & Co., and Mr. Fergus J. McDiarmid, retired Chairman of the Investment Committee of Lincoln National Life Insurance Company; a description of the Bell System construction program by Mr. Richard R. Hough, President of AT&T's Long Lines Department and an analysis of Bell's cost of debt, cost of equity capital and capital structure by Mr. John J. Scanlon, Vice President and Treasurer of AT&T. In addition, the Bell System presents Mr. W. W. Brown, Director—Operating Results of the AT&T Long Lines

Department, who testified on the financial and operating data for the Bell System; Dr. Alexander Robichek, Professor of Finance at Stanford University, who presented testimony in rebuttal to the Discounted Cash Flow (DCF) methods used by Trial Staff witnesses to arrive at their recommended rates of return; Dr. Martin B. Wilk, Director of Corporate Modeling Research for AT&T's Managerial Sciences Division who testified on the Gordon Model; and Mr. Robert W. Burke, Vice President of Moody's Investor Service, who testified on the rating of bonds.

Trends in Economic and Financial Conditions

2. Dr. O'Leary testified that significant changes in economic conditions and the financial climate have taken place since the mid-1960's, and that they have had a significant impact on the cost of capital, both debt and equity. There was a "period of stability" from 1960 to 1965, during which the rate of inflation was exceptionally steady; the Gross National Product (GNP) deflator rose at an annual rate of 1.4 percent, and the Consumer Price Index (CPI) had an average annual increase of 1.3 percent over that five-year period. An "initial upsurge" in the rate of inflation took place in early 1966. Then, the "inflationary movement subsided temporarily from the spring of 1966 to the summer of 1967;" during this period the indicators showed an arrest in the slight inflationary trend. This period of price stability ended, however, in the fall of 1967, and from this period on there has been a period of rapid inflation. The CPI increased 4.2 percent during 1968, 5.4 percent during 1969, and 6.1 percent during 1970. He pointed out, that the effect on debt costs is shown in the following average yields on new issues of Moody's Aaa public utility bonds:

	Percent		*Percent*
1960	4.77	1966	5.44
1961	4.51	1967	5.85
1962	4.36	1968	6.57
1963	4.31	1969	7.75
1964	4.46	1970	8.59
1965	4.57		

During the latter part of 1970 and early 1971, interest rates dipped to about 7 percent, but since have climbed and, as of the close of the record, the yields on new bond issues were in the range of 8 percent.

3. Dr. O'Leary testified that there have been three main forces accounting for the rising trend of interest rates: (1) during the expansion of the economy, as capital requirements have risen, the aggregate demand for capital funds has tended to outrun the available supply; (2) monetary policy (Federal Reserve and Treasury debt management) has often been forced to be restrictive as a means of combating inflation; and (3) inflation and the expectation of continuing inflation have greatly increased the aggregate dollar demand for capital funds, and at the same time reduced the willingness of savers to place their funds in fixed-income obligations unless the interest rate is high enough to offset the deteriorating effect which inflation is expected to have on the value of the dollar. He states that, although governmental policy has been designed to moderate the rate of inflation, the expectation of a continuing high level of inflation is widespread. Dr. O'Leary testified that the Government's economic policy for 1971–1972, indicating an expansionary policy and an objective of a "full employment budget," has tended to rekindle the fear of inflation during the next few years. The various indicators show a continuation of price increases in 1971: the wholesale price index for industrial commodities increased at an annual rate of 4.8 percent in April 1971, and the GNP implicit price deflator increased at an annual rate of 5.6 percent in the first quarter of 1971. The pattern of wage settlements recently has also contributed to an expectation of further inflation. Dr. O'Leary expects a gradual rise in the level of interest rates in the second half of 1971 because of: expected further increases in the total demand for long-term funds by corporations and the Government to record levels; the expected increases in the amount of Treasury borrowing in the latter part of the year; the continuing powerful expectation of a high rate of price level increases; the enormous backlog of demand for long-term financing by state and local government units; and the expected sharp rise in demand for home mortgage credit. In his view, economic conditions in 1972 are apt to produce a sharper increase in interest rates. This is based on an expectation of an inflation rate

of about 4 percent in the next year, which, when coupled with a general improvement in the economy, would produce increased demands for credit.

4. Mr. Scanlon testified that the dramatic rise in interest rates since the mid-1960's has had the effect of significantly increasing the returns equity investors require. Mr. Baldwin testified that because the common stock investor requires a return substantially greater than the return he could get on a relatively riskless investment (i.e., on fixed income securities), when interest rates rise, the cost of equity also increases. In an effort to measure the extent of changes in the capital markets since the mid-1960's, Dr. Wilk undertook to update the econometric model presented by Dr. Myron J. Gordon, a witness presented by the Commission Staff in the Docket No. 16258 proceeding. (See 9 F.C.C. 2d at 87; 28 F.C.C. 2d at 612.) His objective was to reflect the intent and methodology of Dr. Gordon's analysis. Dr. Wilk testified that whereas the Gordon model produced an overall rate of return of 7.29 percent as applied in Docket No. 16258, the application of the model to data reflecting current economic conditions produced an overall rate of return of 10.7 percent.

The Increase in Embedded Cost of Debt

5. During the period since the mid-1960's, and particularly since 1969, the Bell System's requirements for new capital has increased substantially. Respondents' witness claims that this is the result of the high level of demand for communications services, the introduction of new technology, and the price increases resulting from the high rate of inflation which further enlarged the dollar volume of construction expenditures. These increases in the level of construction expenditures resulted in substantial increases in the amount of external financing required. With the exception of a limited amount of capital obtained from the Bell System's employees' stock plan (which terminated in 1969, virtually all of the external capital funds were obtained in debt form since 1964. In the mid-1960's Respondents' cost of additional debt was in the range of 4½ to 5½ percent. The costs of the most recent issues of Bell System debt have ranged from 7.68 percent to 8.28 percent.

6. In each of the years 1968 and 1969 the Bell System raised about $1¼ billion in the long-term debt markets. In 1970 the external financing requirements increased to $4.2 billion, and this necessitated a step-up in the amount of Associated Company long-term debt issues to over $2.1 billion. The 1970 debt financing program of the Associated Companies involved 17 issues, at a rate of one every three weeks averaging about $125 million per issue. In addition, AT&T made an offering of $1.57 billion of debentures with warrants in April 1970. This issue permits the warrant holder to purchase AT&T common stock at a price of $52 per share until May 15, 1975. In November, 1970, AT&T also sold $350 million in long-term debentures and $150 million in intermediate-term debt. The Bell System's 1971 debt financing program involves Associated Company debt issues totaling about $2.5 billion, about one issue every three weeks, and one issue of AT&T debt in the amount of $500 million. Since new long-term debt has been selling at an appreciably higher cost than the average cost of existing debt, Bell's embedded cost of debt has increased from 3.9 percent in 1965 and 4.1 percent in 1966 to 5.8 percent at the end of 1970. Assuming long-term rates in the range of 7 to 8 percent during the remainder of 1971, Bell's embedded cost of debt will reach a level of about 6.0 percent.

Credit Standing and Capital Structure

7. Bell System witness stated that bond ratings provide the investor with a means of evaluating the investment quality of debt issues and that the quality of bonds depends essentially on how well interest payments and principal are protected. Two of the most significant factors in determining the quality of an issuer's bonds are its debt ratio and its coverage of fixed charges. Coverage of fixed charges indicates the amount by which a company's earnings cover its contractual obligations of a financial nature. Coverage figures may be expressed in terms of coverage before taxes on income (pre-tax coverage) or after income taxes (post-tax coverage). Debt ratio should be considered with reference to interest coverage as the two measures are closely interrelated.

8. Bell System's debt ratio and interest coverage have changed since 1965 as follows:

Year	Debt ratio—end of year (percent)	Post-tax interest coverage (Times)
1965	31.5	6.4
1966	32.9	6.3
1967	34.5	5.5
1968	36.4	4.8
1969	39.5	4.3
1970	44.9	3.3

At the end of 1970, Bell's post-tax interest coverage had fallen to 2.9 times. Witnesses claimed that the decline in interest coverage is due to the substantial increase in the proportion of Bell debt, high interest rates, and the lack of earnings improvement. Mr. Burke testified that interest coverage is one of the most significant factors influencing Moody's opinion about AT&T's credit rating; that AT&T is slipping toward the lower end of the range of the Aaa-rated utilities, and the ratings of certain Bell System companies are in a particularly vulnerable position. Mr. Baldwin also expressed concern about the maintenance of the Bell System's credit standing if an all-debt financing policy were to be followed in the near future and if earnings improvement is not forthcoming. He noted that some Bell System issues are on the edge of being downgraded if there is no rate relief.

9. Mr. Baldwin expressed the view that, because of its unprecedented and continuous needs for new capital, it is of critical importance for the Bell System to maintain the highest credit rating on its debt securities. He said that during a period of persistent inflation and tight money, there has been a marked change in investors' attitudes toward the advisability of tying up funds in long-term, fixed income securities and an increasing desire for high quality investment. As a result, the market for lower quality debt issues has narrowed. He said that the increasing importance of individual investors in the bond markets has added to the need for Bell to keep its highest credit standing. In times of a higher level of interest rates, individuals become substantial purchasers of debt securities. In the issues of AT&T and the Bell operating companies in 1970, a substantial percentage (from 25 to 50 percent) was purchased by individuals, whereas a much smaller percentage of issues of less quality was taken by individuals. Mr. Scanlon also testified

> "We are concerned about losing the Aaa ratings and falling perhaps to Aa or A. The concern does not rest solely on the differences in cost between what it might cost us to sell at an Aaa versus Aa . . . but it rests more on our assurance of the broadest possible market for our debt. Because of the heavy draft we make on the market, because of the frequency with which we come to market, we have been advised on all sides in the investment community that it is highly desirable for us to keep this Aaa rating. A combination of a household name and an Aaa rating assures us of access to the broadest possible market."

10. Mr. Baldwin testified that a high credit rating permits a company to finance exclusively through debt when conditions for the issuance of common stock are unfavorable and that even a downgrading to an Aa rating would have serious effects on the Bell System's ability to finance. The cushion to resort to all-debt financing in a period when equity financing is unfavorable would be seriously impaired and such downgrading would shake investor confidence in Bell debt. Mr. Baldwin testified that a downgrading of Bell securities would not only have serious effects on the Bell System but it would have adverse effects on the market for other corporate debt (Tr. 1810, 1879, 2027; also Tr. 3660–61).

11. The Bell System's interest coverage has changed substantially in comparison with that of the Aaa electrics. As compared with Bell's post-tax coverage of 6.3 times in 1966, the Aaa electrics' coverage was 4.7 times. Since then, there has been a decline for both the Bell System and the electric utilities, but the decline for the Bell System has been steeper. For the year 1970 Bell's post-tax coverage of 3.3 times was about the same as the Aaa electrics' coverage of 3.2 times. At the

end of 1970, however, Bell's post-tax interest coverage had dropped to 2.9 times, below the average of the Aaa electrics for the year. The claim by the witness is that Bell System debt issues in the past have sold at yields somewhat above those of the Aaa electrics despite Bell's lower debt ratio and higher interest coverage, and that these margins are required to sustain its competitive position in the debt market and to merit continued investment interest in Bell debt issues.

12. Mr. Burke stated that it is Moody's view that AT&T, in comparison with the electrics, requires higher interest coverage and should maintain a lower debt ratio in order to retain an Aaa credit standing. From the standpoint of Moody's evaluation of investment risk and the criterion of stability of earnings, the telephone business by its nature is more subject to fluctuations and is more vulnerable to adverse business conditions than the electric utility business. Thus, he says that AT&T needs greater interest coverage than the electrics, since AT&T has a lower percentage of pre-tax earnings per revenue dollar to assist in meeting its interest requirements than does the electric utility industry. Accordingly, he claims AT&T cannot have as high a percentage debt in its capital structure as do the electric utilities.

13. In the opinion of the Bell System witnesses, the current 45 percent ratio represents the prudent limit of debt in Bell's capital structure. The basis for this conclusion was summarized by Mr. Scanlon as follows (Bell Ex. 34, pp. 15–16):

> "I believe it is essential that we maintain our Aaa rating. The frequency and volume of Bell System debt issues to be marketed in the years ahead require that, at the least, we maintain our present credit standing. Accordingly, we must continue to carry a debt ratio somewhat below that of the Aaa electric utilities and to show an interest coverage somewhat above that of the Aaa electrics if we are to assure our access to the capital market for the requisite amounts of debt capital on terms that are fair to our customers and shareowners. In the present circumstances, it is my belief that a debt ratio of 40% to 45% of total capital would be an appropriate objective for the Bell System, and that we should strive to structure our future financing so as to achieve that objective. Such a capital structure would restore a margin of borrowing capacity for periods such as the present, when the raising of equity capital is impractical. And such a capital structure should serve to maintain our competitive position in the market for debt capital."

Mr. Scanlon testified that a capital structure of 50 percent debt, along with its adverse effects on the credit standing of Bell System debt, would not diminish the return on total capital that AT&T requires. He stated that "we have pushed our debt ratio and cost up to the point where the calculated earnings requirement would be at least as great with more debt than it would be with what we now have in the way of debt." Mr. Scanlon claimed that, with a 50 percent debt ratio, Bell's embedded cost of debt would increase, approaching the 6.5 percent level in the next two years and with an equity return requirement of at least 12.5 percent, the resulting return on total capital would still be 9.5 percent. The increased leverage in the capital structure under a 50 percent debt ratio, he claimed, further increases the risks to the equity holders and pushes up the necessary return on equity.

14. In the opinion of Mr. Baldwin, a policy of maintaining a debt ratio in the range of 40–45 percent is a reasonable policy for the Bell System to pursue under present conditions. He said that debt ratio which does not exceed the top of this range would appear to be a reasonably safe figure if the System is to protect its Aaa ratings, assuming adequate coverage is maintained. Mr. Baldwin recommended as a prudent financial policy, however, the maintenance of a debt ratio below the desired maximum to provide some reserve of borrowing capacity. Such a reserve is of particular significance for the Bell System, which is not able to defer capital expenditures without adversely affecting service to its customers. He said such a reserve would enable Bell to continue necessary financing during periods of adverse conditions in the equity markets.

The Need for Equity Capital

15. The Bell System's claim is that its operations are highly capital intensive and, if it is to meet service demands, the sale of securities cannot be limited to periods when the financial climate appears to be favorable. The capital markets must be tapped repeatedly for a continuous flow of tremendous amounts of new

funds which cannot be deferred in the hope that the market may improve. The Bell System's needs for external financing in 1971 are estimated to be in the range of $4.0 to $4.2 billion. To finance the construction expenditures for 1971 estimated to be about $7.7 billion, the Bell System will have available internally generated sources of funds from depreciation and other accruals, amounting to about $2.7 billion, and from retained earnings in the range of $1 billion. The 1972 construction program is estimated to be somewhat higher than in 1971, about $8.2 billion. With a construction program expected in the next several years to be at least as much as in 1971, the Bell System must obtain more than half of the needed funds from external financing. This means that the Bell System must annually raise new money in the range of $4 billion in the capital markets for the next several years—more than $10 million for each day of the year. Such external financing requirements must be met by attracting both debt and equity capital. With a $7.7 billion construction program in 1971 and depreciation accruals supplying $2.7 billion, the remaining $5 billion must be generated by retained earnings and external financing. To keep the capital structure of debt and equity in about the same proportion as now exists, nearly half of the $5 billion must come from debt and one-half from equity. This requires new equity financing of about $1.5 billion (with retained earnings supplying the remaining $1 billion of equity).

16. Mr. Scanlon testified that with construction expenditures of the magnitude described above, the Bell System's return requirements must be set in such a way as to insure the necessary flow of a very large volume of capital funds. He testified further that, even if no external capital had to be attracted, fairness to existing investors would call for a rate of return determined by the cost of attracting capital in the money markets. When capital must be attracted in substantial amounts, as is now the case, the public's interest in assuring the provision of adequate service constitutes an additional and compelling reason for prescribing a rate of return sufficiently high to attract funds in the light of current costs of capital.

17. As to debt, Mr. Baldwin was of the view that there are financial constraints limiting the frequency and magnitude of Bell's debt financing under current money market conditions. He noted that the Bell System is the largest single issuer of corporate debt securities in the United States and he concluded that the present annual volume of Bell System straight long-term debt financing is approaching the current maximum that can be accomplished on a continuing basis in the conventional debt market on reasonable terms. If Bell were to offer substantially more straight debt every year, a substantial rate differential would develop between Bell debt and that of other utilities of high credit standing. He said that the present frequency, as well as the size of Bell debt issues, has contributed to a congestion in the debt market and the market is close to a saturation point on absorbing Bell debt.

18. As to short-term debt the Bell System embarked on a program in 1968 where they obtained the major portion of their short-term needs from bank loans and the sale of commercial paper. This process helped for a time to mitigate the Bell System's reliance on the long-term debt market. Mr. Scanlon concluded that the size of such short-term obligations has now reached the maximum range (about $2 billion) and that additional amounts of such debt cannot prudently be carried. Mr. Baldwin testified that AT&T and its subsidiaries have reached a desirable maximum under present conditions on their short-term borrowings and that it is an unsound business practice to use short-term debt to pay off long-term debt. Mr. Scanlon also noted that, although the Bell System has employed a limited amount of intermediate-term (i.e., 5 to 7 year maturities) debt recently, the market for this type of financing is not as widespread as for long-term debt. Further, he stressed that the issuance of such debt in large amounts could create enormous problems in refunding if there are adverse circumstances in the capital markets in the mid- and late-1970's.

19. In addition the Bell System claims that its access to the debt markets is greatly limited by its present earnings position and deteriorating credit standing. An all-debt financing program in 1971 and 1972 would result in a debt ratio of 48.4 percent at the end of 1971 and 51.4 percent at the end of 1972. If earnings were held to the rate of return prior to the filing for increased rates, and long-term debt were issued at an average cost of 7½ percent, Bell's interest coverage (post-tax) would decline to 2.64 times at the end of 1971 and to 2.33 times at the end of 1972.

This level of post-tax interest coverage is below that of the Aaa electrics, which was 3.2 times in 1970 and would be below the coverage of the single A electrics (2.5 times in 1970). It is, therefore, Bell System's claim that all-debt financing would result in a downgrading of its credit standing and that, in view of the increase in Bell's debt ratio, and the continuing decline in its interest coverage, new equity capital must be injected in Bell's capital structure in order to maintain Bell's credit standing.

Current Equity Earnings Inadequate

20. Bell System witnesses claimed that the current market price for AT&T stock effectively precludes a common stock offering at a price that would be fair to existing shareholders. It is stated that the market price for AT&T has been persistently depressed since 1965 as follows:

	Average market price per share
1965	$66.83
1966	55.92
1967	54.87
1968	51.87
1969	52.92
1970	46.75

The low price of $40⅜ reached in June 1970 is about 40 percent below the high of $75 reached in July 1964. There was a brief rally in AT&T's market price in early 1971, where prices in the low $50's were reached for a short time, but since then AT&T's market price has generally been in the range of $44 to $49. It was selling at $44½ at the close of the hearings. Although the market generally recovered significantly in 1971, AT&T's market price remained stagnant during the recovery, as shown below:

	Dow Jones average	A.T. & T. market price
Date of Dow Jones Industrial Low (May 27, 1970)	631.16	$43.12
Date of Dow Jones at 920 level (May 19, 1971)	920.04	46.63
Percent increase (percent)	45.8	8.1

In recent years AT&T stock has had a poorer price record than either the industrials or the public utilities and AT&T's market price in relationship to the performance of these other stocks has placed the Telephone Company at a material disadvantage in the sale of new equity. As a result more than half of the Company's shareowners find the present market price of their shares below the price at which they first bought their shares.

21. The relationship of market price to book value is of critical importance according to the opinion of the Bell System witnesses. The following shows how market price for AT&T compared to book between the 1960's and 1970:

	Average market price per share	Average book equity per share	Market/book relationship
1960	$43.76	$26.91	1.63
1961	59.71	28.78	2.07
1962	58.09	30.15	1.93
1963	61.73	31.49	1.96
1964	69.90	34.08	2.05
1965	66.83	35.80	1.87
1966	55.92	37.43	1.49
1967	54.87	39.00	1.41
1968	51.87	40.54	1.28
1969	52.92	42.10	1.26
1970	46.75	43.52	1.07

As of the close of the record (June 3, 1971) AT&T's market price ($44.50) was below its net book value of $44.75.

22. The testimony was that AT&T's ability to finance in the future would be seriously impaired if it were forced to resort to a sale of common stock that would yield an amount less than book value; that such a sale involves a dilution of investment and earnings value per share of existing shareowners; that such dilution would effectively preclude AT&T's access to the equity markets in the future to raise sufficient amounts of capital; and that shareowners and investors generally would be extremely wary of investing in a company that followed a policy of undermining the value of existing investment. For the Bell System, that has recurring and substantial capital needs, to make repeated efforts to market new shares at prices below existing book value, would prove to be self-defeating. Mr. Baldwin states that AT&T shareholders in the past have been an important source of new equity financing for the Bell System, and such investor loyalty is an extremely valuable asset in financing equity. A good earnings and dividend record is essential if this support is to be retained. If, as a result of dilution, shareholders were to find that their participation in offerings worked to their detriment rather than in their favor, this large source of new capital might well be lost.

23. It is also claimed that the market/book relationship for AT&T stock when compared to other utilities, has an important bearing on AT&T's ability to attract new equity through a common stock offering. Electric companies generally sell at a market price significantly above book value. All of the Aaa electrics sold above book value for 1970, the market/book ratio ranging from 1.15 to 2.38, with the average being 1.61. In January 1971, the average of Moody's 24 utilities sold at 145 percent of book value. The assertion is that the companies with favorable marketbook relationships are in a position to issue new equity; they have ready marketability because of their higher investor appraisal; and such new issues not only improve the ability of those companies to attract new capital, but they also enhance the position of their existing shareholders by further contributing to the growth in earnings per share as well as increasing their proportionate underlying investment.

24. Mr. Baldwin testified that a rights offering is an important means of raising capital for AT&T and that an equity rights offering should be set at an offering price that is at least 15 percent to 20 percent under the market price. That is, if the book value is $44, the market price for the stock should be selling at a minimum of $55 per share in order to permit a rights offering that does not result in dilution. Mr. Scanlon concluded that in order to sell common stock without dilution, the premium of AT&T's market price above book value should be in the order of 20 percent. Mr. Scanlon also testified that "because of the importance of the rate of growth in earnings per share and satisfying equity investors' return expectations it is important that when you do sell equity you do it if at all possible at prices above book value." He explained that a sale of common stock that would permit the Company to receive proceeds just at book value would not be adequate to contribute to an increase in the growth rate in earnings per share that is necessary to satisfy investor expectations.

A Return on Equity in the Range of 12½ Percent Is Required

25. The Bell System's witnesses contended that the two major changes affecting AT&T's cost of equity are (1) the increased leverage in AT&T's capital structure substantially adding to the risks assumed by the equity holders, and (2) the general increase in the cost of both debt and equity capital since the mid-1960's. It is claimed that the Commission found that at the time of its decision in Docket 16258, the electrics were earning 11.7 percent on equity and that the Commission recognized that as the Bell System moved toward a higher debt ratio, its equity return would move closer to 11.7%. The Commission, it is claimed, thus recognized that the increase in Bell's debt ratio involved greater risks to the equity holders, but at the same time it assumed that the shareholders would be compensated for such greater risks through increased equity returns approaching 171. percent under 1965–1966 economic conditions.

26. It is further argued that, at the time of the Commission's decision in Docket No. 16258, interest rates were in the range of 5½ percent and were expected to go lower; that this was a level substantially below the range of 7 to 7½ percent

rate of return found to be fair at that time; and that the Commission's premise—that within any allowable overall rate of return, earnings on equity will increase as the proportion of debt rises—was arithmetically correct under such conditions. However, when interest rates for new debt are about equal to the level of the return earned on total capital, increasing leverage does not serve to improve equity earnings and when interest rates for new debt exceed the level of the overall return, a decline in equity earnings takes place with increased leverage. This, it is stated, was the situation during recent periods when current interest rates were significantly in excess of Bell's overall return. Under recent conditions, therefore, increasing the debt ratio has had a depressing effect on equity earnings, which is the reverse of the situation anticipated by the Commission in its Docket No. 16258 decision.

27. Bell System's witnesses testified that in a situation where current interest rates exceed the return earned on total capital, equity earnings are not improved by merely raising the allowable rate of return on total capital to reflect the increase in the embedded cost of debt and nothing more. Such action would simply maintain the return on equity at the level that had existed at the time the debt ratio was lower. Thus, a marked rise in interest rates coupled with a substantial rise in the debt ratio requires that the return on equity also be increased for two important reasons. First, the substantial increase in the debt ratio significantly increases the risks borne by the equity holders by concentrating the risks of the enterprise into a smaller proportion of the total capital, with an accompanying sharp decline in the proportion of earnings available for equity. Second, and quite apart from the increase in the equity risks, the same forces at work in the financial markets which caused the cost of debt to rise so markedly also increase the cost of equity capital. The Bell System's rate of return on equity since 1965 is as follows:

	Percent return on average common equity
1965	9.5
1966	9.9
1967	9.7
1968	9.3
1969	9.5
1970	9.2

As a consequence of the recent decline in the rate of return on equity, the earnings per share in 1970 ($3.99 per share) showed no growth over the earnings per share in 1969 ($4.00 per share) despite the fact that Bell's equity investment had been increased by $760 million through retention of earnings from stockholders.

28. It is claimed that changes in the capital structure since the Commission's decision in Docket No. 16258 alone would call for a substantial increase in Bell's rate of return on equity. The debt ratio has risen from 31–33 percent to above 45 percent, but its equity earnings in the 9 percent range are still no higher than at the time of the Docket No. 16258 decision. Thus, even if the returns required by investors were the same today as they were in the mid-1960's, the greater risks to the equity investors caused by the substantial increase in its debt ratio, and the concomitant reduction in interest coverage, would require an improvement in equity return.

29. Witnesses testified that a level of equity earnings in the range of 12.5 percent is reasonable compared to the current level of interest rates available on fixed-income obligations—investments of much lower risks. Current interest rates on Aaa bonds (the highest quality debt investment) have been in the 8 percent range. Yields on other fixed income obligations are even higher than interest rates on Aaa debt. Although interest rates have subsided somewhat since their highs in 1970, they are still several percentage points higher than in the mid-1960's. The Bell System's equity return objective, as Mr. Scanlon testified, was based on an expectation of interest rates at a level of 7 to 8 percent.

30. With respect to the spread between AT&T's cost of current debt and its average return on equity, as AT&T's debt ratio increased, this spread has decreased as follows:

[Figures in percent]

	Debt ratio	Current cost of debt	Return on equity	Percentage point spread
1961	32.8	4.6	9.5	4.9
1962	34.5	4.4	9.5	5.1
1963	33.9	4.4	9.5	5.1
1964	31.5	4.5	9.5	5.0
1965	31.5	4.6	9.5	4.9
1966	32.9	5.5	9.9	4.4
1967	34.5	5.9	9.7	3.8
1968	36.4	6.6	9.3	2.7
1969	39.5	8.0	9.5	1.5
1970	44.9	8.8	9.2	0.4

Restoration of the prior five point spread would require a rate of return on equity exceeding 12.5 percent according to Bell System's witnesses. Respondents further contend that, at the time of the Commission's decision in 16258 the current cost of Bell debt was in the range of 5½ percent with an expectation of going somewhat lower; and that the rate of return on equity associated with the Commission's determination of 7½ percent as the allowable overall rate of return and a 45 percent debt ratio was 10.4 percent. Thus, it is argued that the Commission considered a five percentage point spread between current interest rates and return on equity appropriate.

31. The claim is asserted that, in determining an appropriate level of equity earnings for AT&T, comparison with the electrics is another appropriate measure. Mr. Scanlon concluded that the financial risk for AT&T stock is now about in parity with that of the electrics, and that, with the increase in business risks attending AT&T since 1966, AT&T now requires a return on its equity fully comparable to that of the electrics. The price/earnings ratios of the electrics are comparable to that of AT&T. Mr. Scanlon pointed out various respects in which he considered that the electrics have greater stability, and hence, less risk than the Bell System because the earnings of the electrics indicate a lower vulnerability to a turndown in business (the Moody's Aaa electrics had an increase in their rate of return on total capital in 1970); the electrics operate under a rate structure that is less susceptible to adverse business conditions; and the electrics have a lower complement of labor which makes them less vulnerable to the recent inflationary effects of wage increases. Other witnesses also testified that AT&T is as risky, if not more so, than the electrics.

32. Mr. Scanlon testified that, during the period 1966–1969, the earnings rate on equity for the regulated electrics has been in the range of 12.5 percent. Many electrics are seeking rate increases to attain higher returns on equity. In current rate cases in progress, the electrics are asking for 13½ percent and upward on their equity. On the basis of these data, Mr. Scanlon concluded that in order to attract equity capital in competition with the electrics and other companies coming to the market for equity financing, AT&T must earn in the range of 12.5 percent on equity.

33. Mr. Scanlon stated that the level of return required to attract equity investment is substantially influenced by the institutional investors which are a dominant force in the market for equity securities today and that the approach of the institutional investor is to look for a total return on his investment through a combination of dividend and price appreciation. The price appreciation is presumed to derive chiefly from growth in earnings per share—from which increases in dividends and market price should follow. Consequently, growth in earnings per share is an important factor in investment analysis and decision-making today. Mr. Scanlon's review of market letters and the Company's discussions with representatives of institutional investors indicate that such investors in general are requiring annual growth rates in earnings per share for AT&T of 6 percent or better. Mr. Scanlon concluded that this growth rate, coupled with AT&T's current dividend yield, indicates that investors require an earnings rate on AT&T stock to be at least 11 percent on market value. With AT&T's return on book equity at a level of only 9 percent, its current growth rate in earnings per share is only a little more than 2 percent per year. He contends that AT&T must realize a substantial improvement in its equity earnings to achieve the earnings growth rate and market return needed to attract equity investment.

34. Data from a simulation model were presented by Bell witnesses to show that, if Bell maintained its current debt ratio of 45 percent and if new debt costs were in the range of 7 percent to 8 percent, a return on total capital of 9.5 percent (which would produce an equity return on the range of 12½ percent) would result in an annual growth rate in earnings per share from 4.2 percent to 5.4 percent (depending on whether the price/earnings ratio for AT&T stock is 11 times or 13 times). In contrast, an 8.5 percent return on total capital (producing equity earnings in the 10¼ percent range) would result in an annual growth rate of only 2.4 percent to 4.0 percent. A 7.5 percent return on total capital (with equity earnings in the 8½ percent range) would produce a growth rate ranging from a negative 1.1 percent to a positive 1.7 percent. Accordingly, the contention is that a return on total capital at the 9½ percent level is necessary for AT&T to achieve an earnings growth rate near the 5 percent level through retention of earnings. Additional growth in earnings per share would result from AT&T's ability to issue new common stock on terms where the proceeds per share would exceed the book value per share.

35. Mr. Baldwin testified that AT&T must be able to attract equity capital from new investors with its offerings as well as from existing shareholders. The increasing trend among American corporations to issue new equity significantly adds to the supply of securities available for investment and heightens the already highly competitive nature of the equity markets. He observed that in order to issue equity in such highly competitive capital markets, the potential investor's expectation of the likely return on an investment in AT&T must be at least equal to expected returns on comparable investments. In the view of Mr. Baldwin the informed investor of today is looking for market returns (dividends and market appreciation) on his common stock investment in the area of 11 to 13 percent. He concluded that AT&T's current dividend yield coupled with its low recent earnings per share growth is inadequate to attract investors. Mr. Baldwin states that an upward trend in earnings per share and dividends will have to be re-established for AT&T to attract the large amounts of new equity capital needed and that AT&T must bring its equity return up to the range of 12.5 percent in order to offer investors the minimum return on market value necessary to attract substantial amounts of new capital.

36. Mr. McDiarmid was of the opinion that an appropriate return on the equity capital of AT&T is in the range of 12.5 to 13 percent. He stated that this return provides only the minimal spread over the current cost of senior capital, and only modestly higher than those returns (close to 10 percent) available to institutional investors on many bonds and mortgages. Mr. McDiarmid testified that his recommended return on equity is in line with that return earned in recent years by the electric utilities, which return the electrics are now seeking to improve. He said that even under this recommendation there is room for substantial doubt whether it is high enough. In his opinion, a 12.5 to 13 percent equity return is the lowest rate AT&T should earn to enable the Company to sell new common stock without diluting the equity interests of existing stockholders.

37. Mr. Scanlon testified further that with a 9½ percent return on total capital, with a 12½ percent return on equity and maintenance of 45 percent debt ratio, there would be a halt to the further decline in the Bell System's interest coverage and Bell would be able to maintain interest coverage in the range of 3.2 to 3.3 times, which is comparable to that of the Aaa electrics.

Rebuttal to Trial Staff Witnesses

38. Dr. Robichek disagreed with the concept of applying a DCF rate, based on a market evaluation of investor expectation, to the net book value of the equity investment as was done by Dr. Myers and Mr. Kosh, witnesses for the Trial Staff. A distinction must be made between the concepts of (1) the rate of return expected by investors purchasing a security at its current market price (i.e., a "market" oriented DCF rate), and (2) the rate of return related to the net book value of capital (i.e., a "book" rate). It is a contradiction, he says, to use such a "market" rate as a multiplier to be applied directly against a net original cost rate base, which has a per share value different from the market price per share. Application of the DCF method in this manner has the consequence of forcing the market price per share to its net book value. Such a policy would be a circular process, it is claimed. Moreover, he claimed that the DCF method depends upon "hazardous" estimates of investor expectations, since the

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growth factor "g" in the DCF formula depends in large degree upon the level of earnings regulatory agencies will allow.

39. Mr. Burns submitted testimony and data, which it is contended show that a 50% debt ratio proposed by Mr. Kosh would not provide the interest coverage claimed by Mr. Kosh; but such interest coverage would be somewhere between the A and Baa electrics which have a debt rating substantially below the Aaa electrics.

Exhibits Other Than Testimony of Witnesses

40. In addition to the testimony of the aforementioned witnesses, the Bell System provided for the record a number of additional exhibits briefly described as follows:

Number of AT&T Shares Outstanding (pg. 902 of Bell System Statistical Manual)
Cost of Debt for Bell System (pg. 112 of Bell System Statistical Manual)
Percentage Composition of Total Capital (pg. 408 of Bell System Statistical Manual)
Bell System Capital and Debt Ratio as of February 1970
Number of AT&T Shareowner Accounts
Commission's Public Notice dated 11–5–69 ($150 m reduction)
Commission Memorandum Opinion and Order 12–31–69
Commissioner Cox's and Johnson's dissent to $150 m reduction
Major Collective Bargaining Settlements, 1970
Current Wage Developments May 1, 1970 Issue No. 269
Current Wage Developments Jan. 1, 1971 Issue No. 277
Comparison of Rate of Return on Market Investments-Lincoln Life Performance versus various mutual fund summaries
Market prices for Moody's Utilities plus 3 companies
Changes in Ratings for Bonds $5 m and over issued since 1913
Major non-MTS Rate Changes 1952–1970
Effect on Rate of Return on MTS Rates effective 10–1–53
Interstate MTS and Private Line Revenue Compared to Total Interstate Revenue
Interstate MTS and Private Line Revenue as shown in Exhibit 19 revised and updated to include years 1952–1970
Dividend Payout Ratios for AT&T and Other Industries
Statement of W. W. Betteridge
Interstate Cost of Service Study 8/31/70 under 7 methods (not offered in evidence)
Speech by R. W. Burke on Rating Service for Utility Bonds
Quality of Service Report
20 City Report Data Summary (Quality of Service)
Analysis of Causes in Change in Interstate Maintenance Expenses
Analysis of Change in Maintenance Expense
Analysis of Causes in Change in Interstate Traffic Expenses
Analysis of Change in Traffic Expense
Bell System Interstate Service Revenue 1960–1970
Number of Bell System Employees added for Maintenance 1965–1970
Interstate Data re Messages, ARPM, Av. Length of Haul and Call by Month since 1966
Embedded Cost of Debt 1971
Percent Wages are of total Expenses 1969, 1970 and Est. 1971 for the Bell System
Margin of Safety (certain Electrics vs. AT&T) 1969 and 1970
Debt charges in relation to Available Income (Bell System)
AA Electric with Pre-Tax Interest Coverage 4.9 or more in 1969
Bell Telephone Debt held by 18 Large Insurance Cos.
Total Electric Utility Industry, Revenues, KWH and Cents per KWH for 1969
Revised Staff Exhibit 20 re Debt and Equity Earnings
Table showing that 40% Debt for Subsidiaries + 40% for Parents results in 60% Debt for Combined
Bell System Debt Ratio and Interest Coverage 1970–1972
1965 Common Stock Subscription offers—Utilities
Interest Coverage (SEC Method) and Debt Ratio 1970

Companies with Debt Rated AAA by Moody's—April 1971
Consolidated Edison Terms of New Common Equity Offers 1959–1970
Cost of Bell System Issues and Money Rates 1950—3/30/71
Vandalism Costs—Coin Stations
Employee-Shareowner Account Activity 1965 to 1968
New Purchases and Sales of Mutual Funds during 1970
Return on Average Common Equity Investment 1960–1969
Return on Average "Common Stock and Surplus" 1960–1969
Past Average Rates of Return on New York Stock Exchange Common Stocks and Corresponding High-grade Bond Yields
New York Times Article of 4/21/71 entitled "Market Place". How the funds look at AT&T
Estimating an Infinite Stream of Dividends
Calculations re Rate of Return Assuming Certain Changes on Equity, Debt and Embedded Costs
Excerpt of D. Kosh Testimony regarding Capitalization Rate submitted Feb. 1971 in connection with C & P Tel. Co. Case of W. Va.
Computation of the Capitalization Rate at Various Rates of Growth
DCF Calculations for AT&T, W.U. and Airlines
Table Showing No. of Shares Traded by AT&T and those Principle Telephone Company Subsidiaries used by D. Kosh in his Study
Discount Price Underlying Kosh's 3 Year Average
Recalculation of Cost of Debt originally submitted by Kosh by AT&T Using a Higher Interest Rate for 1971
Excerpt from FCC Exhibit No. 2115 "Cost of Capital to AT&T from the Original Investigation Study of the Telephone Industry (1936)"
Bell System Long-term Debt Issues 1970–1971
Recent Monetary and Interest Rate Developments
Moody's Bond Survey May 1971
Wholesale Price Index for Industrial Commodities
Changes in Dow-Jones Industrial Average and AT&T Stock 1970–1971
First National City Bank Monthly Economic Letter May 1971
Simulation Results of Model (Financial)
List of Open Requests from Transcript
Dollar Returns from a 35 Year Investment in a 35 Year $45 Bond at 10% Interest with Mandatory Reinvestment of 40% of Interest Payment on Bond
AT&T Prospectus on $4 Convertible preferred Shares
List of Bell System Rate Case filing since 1968

Bell Data Officially Noticed

41. In addition to matters elsewhere officially noticed here, we take notice of the approximately 65 pages of material submitted by Bell at the request of the Trial Staff in its letter to Bell of August 3, 1972. This additional material is identified as follows by tab numbers:

Tab 1—
Consumer Price Index
Yield on Moody's Aaa utility bonds
Growth in construction expenditures and new money requirements
Bell System Long-Term Debt Issues
Bell System Intermediate-Term Debt Issues, 1970 to date (Same format as for Long-Term Debt Issues)
Bell System debt ratio
Bell System debt costs
Bell System preferred stock ratio, 1970 to date
Bell System preferred stock cost, 1970 to date
Interest Coverage (post-tax)
Debt ratio, AAA electrics
Costs of new bond issues
Market prices—Moody's 125 Industrials, Moody's 24 Utilities and AT&T
AT&T market and book values
Market/book ratios—Moody's 125 Industrials, Moody's 24 Utilities, AT&T
Price-earnings ratios—Moody's 125 Industrials, Moody's 24 Utilities, and AT&T

Equity earnings of alternative investments
Bell System equity earnings vs. debt costs
Bell System short-term debt at year end 1970 and 1971 and July 31, 1972 and cost rate at each of these dates.

Tab 4—
Bell System Interest Coverage—Pre- and Post-Federal Tax

Tab 5—
Summary of Aaa Electric Utilities (Capital Structure Ratios)
Summary of Moody's 24 Utilities (Capital Structure Ratios)
Post-Tax Interest Coverage—Summary of Aaa Electric Companies
Pre-Tax Interest Coverage—Summary of Aaa Electric Companies
Post-Tax Interest Coverage—Summary of Moody's 24 Utilities
Pre-Tax Interest Coverage—Summary of Moody's 24 Utilities

Tab 6—
Present AT&T shareowners bought shares initially at prices

Tab 7—
Construction Program Data—Class A & B Privately Owned Electric Companies

Tab 9—
Bell System Debt Maturing Annually

Tab 10—
Anticipated Bell System Construction Expenditures, Interstate and Intrastate
Estimated sources of internal financing, excluding retained earnings

Tab 12—
AT&T Warrant Prices

APPENDIX B

Trial Staff's Testimony and Data

Dr. Myers

1. The Trial Staff submitted the testimony of two expert witnesses on the cost of capital and fair rate of return for the Bell System. The first, Dr. Stewart C. Myers, is an Associate Professor of Finance at M.I.T. He discussed the applicability of finance theory to public utility rate cases and to the rate of return issue and concluded that AT&T's return on equity should be 10.5% and that the overall rate of return should be 8.5%. Dr. Myers used the Discounted Cash Flow (DCF) method to estimate the cost of equity capital. He made a study of and examined the characteristics and past performance of AT&T common stock, in comparison with the market as a whole over various periods of time. He concentrated on the volatility of price changes in AT&T stock as against those of the market as a whole in order to judge the relative riskiness of AT&T stock as an investment compared with all other stocks. He concluded that AT&T has a market sensitivity index of .7 as compared to 1.0 for the market as a whole. Dr. Myers also studied the total yield on a large number of stocks over a number of different intervals (1926–1965; 1945–1965, etc.), and concluded that "investors are expecting a return of 10–12% from an 'average' security". His view is that, taking into account various complicating factors, these bounds can be taken as probable, but not absolute limits on investors' expectations for the market as a whole. However, since, in his view, AT&T is less risky than the average, Dr. Myers concludes that it should provide a return in the lower part of this 10–12% range which he recommends be fixed at 10.5%.

2. Dr. Myers testified that an increase in the Bell System's debt ratio to 50% would decrease the overall cost of capital to the company slightly. He stated that the cost of equity capital is sensitive to changes in interest rates, and that consideration of the rise in long-term interest rates of .4 of one percentage point since the date of submission of his written testimony would lead him, if considering that aspect of the matter in isolation, to increase that cost of equity to about 10.9%. He stated, however, that other factors might well have changed since the date of the submission of his testimony affecting his other conclusions and that interest rates were just one factor. He said his overall recommendation would not necessarily be changed any time interest rates change because there are many other factors involved.

3. Dr. Myers expressed the view that the Commission, once having found the fair rate of return, should apply conscious use of regulatory lag and should allow the experienced overall rate of return to fluctuate 2 percentage points on either

side of the fair rate found by the Commission. He also claimed that reliance on regulatory lag would result in a "looser system" than one where earnings are equal to cost of capital at all times and applied to book value so as to push market price to book value. Under his recommendations, he stated that market would be higher than book.

Mr. Kosh

4. The staff's second expert witness on rate of return was Mr. David A. Kosh. Mr. Kosh is a recognized public utility consultant who has testified in numerous regulatory proceedings including many involving Bell System companies. He testified before this Commission in *The Western Union Telegraph Co.*, 27 FCC 2d at 524–530.

5. Mr. Kosh also used the DCF method (Staff Ex. 58, pp. 33–34) to estimate the cost of equity capital, although there are differences in the details of the studies made by Dr. Myers and Mr. Kosh. Mr. Kosh concluded that the overall cost of capital to Bell is 7.9%, with an equity return of 9.75%, based on his recommendation that the Bell System adopt a 50% debt ratio. For estimating the sustainable, long-run growth factor used in his DCF formula, Mr. Kosh refers to data on five selected operating companies of the Bell System as the best indicia of what might be expected for the future. He concluded that investor expectations for dividend yield were 5.1% (after allowance for pressure) and 4.5% for growth. The cost of equity capital of 9.6% was increased to 9.75% by addition of a "margin of safety" of 0.15%.

6. Mr. Kosh stated the view that, with an increase in the debt ratio there should be, theoretically, an increase in equity earnings. However, he testified that he was able to make definitive analytical statistical studies based on data of electric and combination gas and electric companies, to test the effect of capital structure on the cost rate of equity and that these studies showed that for equity ratios in the range of 35% to 50%, capital structure had no effect on the cost of equity.

7. Mr. Kosh stated that, in a Wisconsin case, he had testified that: "When the rate actually being earned on equity is equal to the cost of equity as computed by the discounted cash flow formula, i.e., cost of equity equals dividend yield plus growth, then market price of stock equals book value", but he explained this earlier testimony herein as follows:

> "I used the term cost of equity in the economic sense of cost. Cost being the minimum supply price. What I say there is this, when you use the DCF and put into the factors that are barely sufficient so that the end result is the bare minimum, the barely sufficient figure, the figure that an economist calls cost, the minimum supply price, under these conditions market price is going to be equal to book value.
>
> "On the other hand, if you put in allowances and safety factors in a component, the end result is the cost of equity usable for rate regulations. It is above the minimum supply price and under those conditions the market price will be above the cost of equity—the market price will be above its book value."

8. Mr. Kosh also testified that, in applying DCF procedures, there is a need for a reliable estimate of what the market is anticipating in the way of future growth of earnings and that the problem is that such an estimate is a subjective judgment based upon data and analytical material. Mr. Kosh contends that the DCF procedures are not circular in that the use of the market DCF formula via the dividend yield breaks any such circularity.

9. Mr. Kosh adjusted the historical data on dividends and book value per share for the benefits received by the AT&T shareholders through subscription rights. The effect was to produce a higher growth rate than would have been obtained by the use of unadjusted historical data. The rate of growth in book value per share was: 1950–1970—4.2%; 1954–1970—4.56%; 1957–1970—4.85%; 1962–1970—4.49%; and 1965–1970—3.63%. Mr. Kosh used a growth rate component of 4.5%.

10. Mr. Kosh used the dividend yields that existed during the years 1968 to 1970 as the best approximation in his view of the near term future situation at the improved rate of return level. The price-earnings ratio implicit in Mr. Kosh's DCF return estimate is around 12 at the improved level of earnings compared with the current level of around 11 and the average price-earnings ratio of 18 for the decade of the 1960's. This implicit price earnings ratio of 12 at the improved earnings level provides a margin of safety in that it is at the lower end

of the price-earnings ratio range experienced by AT&T from 1960–1971. Mr. Kosh analyzed the cost of capital in alternative investment opportunities which he considered to be of comparable risk to the common stock of AT&T. These were the publicly traded equities of the operating companies of the Bell System. Mr. Kosh did not use the equities of the electric utilities because he contends that the equities of electric utilities are not alternative investments of comparable risk to AT&T equity.

11. Mr. Kosh gave weight to the capitalization rates of the Bell System operating companies in arriving at the cost of capital of AT&T. He found the indicated AT&T cost of equity capital to be 9.6% and the average cost of equity capital for the 5 Bell operating companies to be 9.9%. Mr. Kosh testified that "This then is my range [9.6–9.9%] of the cost of equity." He then raised the 9.6% cost of equity capital to AT&T to 9.75% in light of the cost of equity capital evidence for the alternative investment opportunities of comparable risk "[i]n order to provide a margin of safety."

12. With regard to Bell System's bonds Mr. Kosh testified: "I don't regard the maintenance of a triple A rating, no matter what, is of great significance; no, sir." The relevant issue, Mr. Kosh states, is the revenue requirements cost of maintaining any given number of times interest coverage by earnings. "So the real question is, do you save enough interest to overcome the increase in revenue required to achieve the higher interest coverage." Mr. Kosh testified that a post-tax coverage of interest by earnings of 3.6 times rather than 2.6 times obtained with a capital structure of 50% debt under his recommendations would be a "very bad bargain indeed" for revenue requirements would have to be increased by $670 million per year to save $5 million in interest. He testified that Bell's cost of debt would have been changed by less than one-tenth of one percentage point by a change in post-tax interest coverage from 2.6 to 3.6 times.

13. In addition to the testimony of the aforementioned witness, the Trial Staff presented for the record additional data and information in exhibit form. These are briefly described as follows:

Rate of Return for Associated Bell Telephone Companies for 1970
Increase in Earnings Required by Bell System to produce 9½% return
Revenue Requirement effect on 1971 Volume for the 1952 and 1953 rate increases
Interstate message and ARPM Data from 1953 through 1970
Earnings per share for AT&T Stock from 1940–1970
Maintenance expense projection from 1965–1970 compared to Actual
Chart showing Actual and Potential Gross National Product 1951–1970
Selected Economic Indicators by month for 1970 (Unemployment, Dow-Jones, Productivity)
Decline in Bond Rates (Wall Street Journal Article)
Disposable Personal Income and Personal Savings 1958–1970
Net Flow of Savings into Institutions 1961–1970
FRB discount rate, Prime Rate, and 3-month treasury bill rate, Ja. 1965—March, 1971
AT&T and Associated Bell Companies Public Bond offers since 1947
Southern New England's Debt Ratio 1946 through 1969
Explanation of Standard & Poor's and Moody's Bond Ratings
Moody's, and Standard & Poor's AAA Utilities and Industrials 1970
Equity and Debt Earnings at 7.5 and 8.5% on $660 million 1971–1975
Several examples of Debt and Equity earnings re changes in Debt and Equity
Brown's Attachment A Updated by Company Letter 1–4–71
Interstate monthly reports (No. 1) for Decembers (1960–1970)
Long Lines monthly report (1B for Decembers 1960–1970)
Interstate monthly report No. 1 for January 1970
Interstate monthly report No. 1 for January 1971
9-way cost study
Bell System construction expenditures 1970–1972
A list of Bell System central office equipment margins 1960–1970
Annual interstate growth rates for operating expenses, maintenance, messages and average telephone plant, 1961–1970 and 1971 view
Western Electric, Average Capital, Equity Earnings and Rate of Return on AEC in 1970
Calculation of rate of return required for Communications Business of AT&T under specified conditions

Western Electric Return on Net Investment and Stockholders' equity for selected years
Selected Interest Rates and Bell System Cost of New Debt
Annual Rates of Growth of Total Capitalization and Telephone Plant Less Reserves of AT&T and Annual Rate of Growth of CNP
Moody's Ratings for Bond Issues of the Parent Company, AT&T and Selected Bell System Operating Subsidiaries, 1945, 1947, 1957, 1959 and 1960
Capital Structure of Class A and B Electric Utilities 1945, 1948, 1950, 1960 and 1968
Total Long Term uses of Capital Funds 1950, 1955, 1960–1970
Cost Spread between Issues of Differing Maturity offered in 1970 on the same day by AT&T and Electric Utilities
Moody's Electric Utilities—Debt issues, Rating, Outstanding amounts, and Percent they are of total
Bell System and AAA Rated Electric Bonds—Cost in 1969 by Month
Bonds of the Bell System and Rated Bonds of Moody's 24 Electrics issues 1960–1969 by term to maturity
Standard and Poor's Earnings and Dividends Ranking for Common Stock of AT&T and Moody's 24 Electrics
Relative Range of Return on Book Equity 1966–1969
Debt Issues of Privately Owned Electric Utilities in 1970 Rated by Moody's
Debt Issues of Private Owned Electric Utilities in 1970 Rated by Moody's
Selected Financial Data for 1970 (Simulation Model) with a 9½% and 8½% Return—All External Financing by Debt with Other Specified Assumptions
Earnings and Dividend Ranking for Stock from Standard & Poor's "Stock Guide"
Illustration of effect of increasing Debt Ratio upon rates and return rates under specified assumptions
Dividend Yield for Moody's 24 Electrics in February 1971
Moody's 24 Electrics—Earnings per Share 1965–1970 and Rate of Growth in Earnings per Share
Comparison of Debt Ratios and Leverage Figures for Principal Bell System Subsidiaries
Variation in price of AT&T Stock with Investment Rate under Alternative Rates of Return on Net Assets and Under Specified Assumptions
Variations in Price of AT&T Stock with Investment Rate Under Alternative Rates of Return on Net Assets and Under Specified Assumptions
Current Interest Rates for AT&T Predicted Under Mr. Wilk's Formulas at Different Marginal Leverage Rates when the Investment Rate is .103
Variation in Price of AT&T Stock with Investment Rate Alternative Rates of Return on Net Assets and Under Specified Assumptions
Statement of Frank Laden
DCF Test (Hypothetical)
Comparison of Dollar Returns from a 35 Year Investment in Equity Purchased at $45 under stated Assumptions and a 35 Year $45 Bond at 8% Interest

14. Pursuant to the request of the Trial Staff, at reargument, we take official notice of the following current data relating to Bell's long term, intermediate term and composite debt costs:

Date issued	Cost of long term	Cost of intermediate	Composite cost
Jan. 5, 1972	7.27	6.48	6.95
Jan. 19, 1972	7.76	----	7.76
Jan. 25, 1972	7.37	6.82	7.10
Feb. 1, 1972	----	7.01	7.01
Feb. 15, 1972	7.30	6.62	7.10
Mar. 22, 1972	----	6.62	6.62
Apr. 10, 1972	7.53	6.89	7.32
May 2, 1972	7.45	6.70	7.23
May 22, 1972	7.39	6.63	7.01
June 13, 1972	7.51	6.65	7.17
July 19, 1972	7.50	6.58	7.13
Aug. 8, 1972	7.43	----	7.43

15. In addition, pursuant to the request of the Trial Staff, we take notice of the "formal legislative basis for Phase II of the new economic policy, the rules and regulations issued by the Price Commission, the Wage Board and the Cost of Living Council * * * what has happened to the consumer price index, the gross national product, actual income after due allowance for inflation, and other recognized measures and indices of economic activity * * * experience of Respondents since the record was updated in connection with the first oral argument herein;" the fact that the Consumer Price Index has "decreased from a going rate of about 6% in the 1970 period to less than 3% over the past 12 months;" that the "purchasing power of the average worker increased 2.9% between July 1, 1971 and June 30, 1972," and that "the government's composite index of leading economic indication rose 4.3% for the second quarter of 1972."

APPENDIX C

Other Parties' Testimony and Data

USITA

1. The United States Independent Telephone Association (USITA) presented two witnesses. The first, Mr. Tyler W. Ryan, submitted written testimony which was essentially a description of the settlement agreements and methods between independent telephone companies and the Bell System. Dr. J. Rhoads Foster, a public utilities consultant, employed both a market approach and a comparable earnings approach and concluded that the minimum fair return on either basis is 9.5% for the Bell System. According to his studies, the required equity return for investors in AT&T is 12.0%. He used the general approach followed by witnesses for Bell, particularly Mr. Scanlon. To the extent that Dr. Foster departed from the approach used by Bell, he relies on a study of the earnings of 13 food processing companies.

Telephone Users Association

2. The Telephone Users Association (TUA) tendered the testimony of Computer and Management Consultant, Melvin J. Laney, who stated his opinions as to the insufficiency of the analytic or actual scientific evidence presented by AT&T in this proceeding. Most of Mr. Laney's testimony was stricken. However, the few statements criticizing AT&T's subjective use of the Gordon Model were allowed to remain in evidence.

Secretary of Defense

3. Dr. Norman C. Lerner testified on behalf of the Department of Defense and for the Executive Agencies of the U.S. Government. He is the Manager of the Economics Department of Computer Sciences Corporation. The purpose of Dr. Lerner's testimony, which is divided into four major sections, is to show that the proposed rate of return requested by AT&T is not justified. In the first section of his testimony Dr. Lerner discusses the relationship of long-term interest rates to the demand for capital, to the money supply, to Federal Reserve policy, and to inflation. He contended that the trend in long-term rates is downward; that there will not be an excess demand for long-term capital in 1971; that there will be an increase in the available money supply for investment purposes; that Federal Reserve policy will continue to act as a restraint on any rise in long-term interest rates and that the expectation of inflation is declining.

4. In the second section of his testimony, Dr. Lerner discusses the investors' affinity for AT&T stock, the element of risk, and the return on equity. He concluded that AT&T stock is attractive to both the institutional and the individual investor and that the element of risk is low. He further states that AT&T's return on equity had not deteriorated compared to other large companies and adds that the effect of including preferred stock in the cost of capital calculation could reduce the cost of capital to AT&T.

5. In the third section of his testimony Dr. Lerner expresses the opinion that the maintenance of a low debt ratio in the Bell System's capital structure has been unwarranted and has unduly penalized the ratepayers. Additionally, he states that while Bell System's interest coverage has declined in recent years, their credit rating has not yet been placed in any great danger. While the credit rating of Southern New England Telephone Co. (SNETCO) was recently lowered, he contended that the downgrading of SNETCO was a special situation and should not be construed to mean that the credit of the AT&T organization is in

jeopardy. The special situation is that SNETCO is only about 18% owned by AT&T and does not consider itself to be a subsidiary of AT&T.

6. In the final section of his testimony, Dr. Lerner deals with AT&T's general financial and economic forecasts, and operating results. He finds the company's forecasting deficient because it does not appear to be related to projections of long-term capital requirements and because their forecasting methodology relies on past relationships between economic variables that may no longer be applicable. Because of these deficiencies, Dr. Lerner has serious doubts about the validity of AT&T's request for such a high rate of return.

Additional Views of Commissioner Robert E. Lee

Today's action is designed to meet the needs of the public for continued, adequate and safe interstate and foreign communications service, and to provide for required construction program to meet such needs.

AT&T is permitted to submit a rate proposal that would enable Bell to increase its earnings which will enable it to attract capital on reasonable terms and to maintain its credit rating.

I would hope that AT&T's rate proposal would, to a large extent, apply to weekday business hour calls and to operator assisted calling where presumably higher labor and equipment costs occur. The business customer using the more expensive service should be expected to pay for it (see footnote 3). Finally, it should be noted that, the general public can reduce its telephone costs by selective calling during certain days and hours.

Dissenting Opinion of Commissioner Nicholas Johnson

You can tell by the time on the press release when the FCC is really putting it to the American consumer. The items it is most ashamed of always come out on the evening before a holiday—when the Commission is desperately hoping no one will notice.

So it was last Christmas, when the FCC wanted to present ATT with a little Christmas eve gift and call off its hearing. See "Why Ma Bell Still Believes in Santa Claus," *Saturday Review*, March 11, 1972, p. 57.

Now it's Thanksgiving Day, and once again we're celebrating at the FCC—giving ATT something to be especially thankful for. For the American ratepayer, however—already confronted with a natural gas increase the day after the election—it looks like another load of turkey feathers.

The upshot of today's decision is that (if the state commissions follow our lead) Bell will be able to earn some $1.3 billion per year more—a 7% increase over its 1971 gross of $18.5 billion.

Almost $500 million of this amount will come from interstate service alone, for today's decision approves a price rise of *15.6%* in interstate telephone prices! (To move from 7.5% to 9.0%, Bell must receive $485 million more; to do so, it must raise prices enough so that, if con-

sumers bought the same amount of telephone service, Bell would receive twice $485 million—because an increase in rates reduces usage.[4])

This ruling constitutes the first formal decision by the FCC on Bell's rates since its 1967 order finding a 7.0 to 7.5% range to be the maximum justified rate of return. Today's decision is an unsupportable outrage—raising that maximum rate to 9%—and maybe even more.

The majority today validates a 1971 Bell price rise of some 7.4% on regular long distance service, throws in another $36 million rise for other services, and authorizes a new increase of $290 million. Moreover, virtually all of this increase will be paid for by regular telephone users—rather than large corporate users.

The total price to consumers? This decision alone approves a price rise of about $500 million per year. If intrastate rates were to reach the same level, the total phone bill for consumers would leap up some $1.3 billion per year—a 7% increase over Bell's 1971 gross of $18.5 billion.

As explained in some detail below, the majority's decision has the following infirmities:

(1) It ignores cogent recommendations of the Commission's Trial Staff, and the Administrative Law Judge who sat through the hearing.

(2) It is based on an unusually stale record—even by FCC standards.

(3) Bell's Thanksgiving really begins with the majority's paragraph 107. While purporting to set a 8.5% rate of return, Bell is told that if it earns 9.0%, that, too, will be approved. There is no telling how high it can go before the FCC will be concerned. The difference between 8.5% and 9.0% is worth $145 million per year to Bell in the interstate services alone—paid for by consumers.

(4) It fails to address *who* should bear the brunt of these increases—business, private line users, or homeowners—or other issues of "cross subsidy." It will be more than one year before the Commission decides whether it is legal and proper for homeowners to bear

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[4] One of the consequences of increasing telephone rates—especially this much—is that people stop using the phone so much.

This raises initial questions about the method of revenue raising used by the phone company. The corporate goal ought to be to *increase* phone usage, not decrease it. Assuming the FCC and consumers are quite prepared to let Bell earn a fair return on its efforts, the more phone usage, the higher Bell revenue. This step in the opposite direction is simply one more example of Bell management's numerous decisions that simultaneously rob shareholder and consumer alike to no one's advantage. See Bell Disqualification Request, 26 F.C.C. 2d 523, 540 (1970). But that is really another issue for another day.

The point before us now is that, having deliberately cut back on its own business, Bell cannot then be heard to argue that its "price rise" doesn't really count; that what should be examined is only how much more consumers will actually pay (for less service than they otherwise would have obtained). If a $1.00 call goes to $1.20, that's a 20% increase for the consumer, regardless of how many fewer calls he makes, and how many fewer minutes he talks each time.

In Bell's November 1970 proposal, it hoped to receive $385 million more per year from consumers. To do so, Bell would have raised prices so that if consumers had bought as much telephone service Bell would have earned $760 million more. The January 1971 decision permitted Bell to receive $175 million more from consumers, but Bell raised prices so that if consumers had bought as much telephone service, Bell would have received $390 million—a price rise of 7.4% based on 1970 Bell interstate revenues.

It is in that sense that I say the rate case before us involves a $500 million increase. If consumers continued to use the phone as much as they do now, they would pay $290–$310 million more. Because the higher rates will discourage phone usage, however, that figure is discounted by Bell and the FCC—in this instance to an estimated $145 million annual increase in Bell revenues. And the extra 0.5% of the permitted range, up to 9.0%, means consumers will pay at least another $145 million more per year in the future—all with FCC approval. Add to this $290 million the $210 million of increases already in effect that are approved here, and the grand total is $500 million per year more paid by the consumer to Bell.

95% of the burden of these increased rates—as the current decision allows.

(5) It refuses to resolve other issues necessarily preliminary to a rate of return hearing, namely, the appropriateness of Bell's costs—operating and capital. It will likely be at least two years before they are addressed and resolved.

(6) It establishes a rate of return likely to reverberate in other jurisdictions. Bell has successfully sought $1.6 billion in telephone price hikes in the past three years. It presently has pending about $1.0 billion in further increases. If the majority's standard is applied everywhere by all regulatory jurisdictions, telephone users will pay an additional $1.3 billion per year above the $20 billion per year they pay now for telephone service.[5] It is this more than *billion*-dollar increase that the public should focus upon.

(7) The majority reveals its decision preferences by deciding this case when no decision is necessary, pressing—or even appropriate—while refusing to conclude consideration of long-pending matters of importance: the one-to-a-market rulemaking, the KHJ renewal case, license renewal procedures, children's television regulation, and the proposed establishment of an FCC public counsel to represent the public in FCC proceedings.

(8) The majority fails to apply the appropriate Price Commission criteria in evaluating the rate increase, and scoffs at the Administration's purported interest in reducing inflation.

The Trial Staff recommended a rate of return of 8%. On this record I believe that recommendation is correct. The Commission's wisdom in separating its staff, and providing consumer advocacy, was clearly demonstrated in this case. No doubt more resources and time were required to do the job properly, but it would be a mistake to abandon the Trial Staff concept. Many of the public interest intervenors, handicapped by the extensive resources needed for common carrier ratemaking, obviously relied on the work of our Trial Staff. The most knowledgeable, and fair, party to this proceeding—the Administrative Law Judge—recommended 7.9% as the minimum return justified by the record. The majority likewise ignores *his* recommendation—despite its relevance to the national economic stabilization policy to keep price increases to a minimum.

The majority picks at the Trial Staff's work, and chooses selectively from Trial Staff evidence to buttress its conclusion; but at least the majority has not adopted wholesale the outrageous demands of Bell—a $580 million increase to 9.5% rate of return levels. Apparently unwill-

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[5] It is, of course, necessary to estimate the total consumer impact of today's decision. However, I believe the $1.3 billion figure to be conservative and easily supportable. The states have generally held Bell to rates of return in the 7.0 to 7.5% range during the past five years. Every percentage point increase in the system-wide average rate of return means that consumers must pay an additional $940 million per year. The FCC is today moving from a former minimum of 7.0% to a maximum of 9.0%—and possibly higher. That is two percentage points, or $1.9 billion. The FCC has moved its maximum from the system's current 7.6% actual rate of return to an approved maximum of 9.0% for interstate. Should the system-wide average rate of return reach this level, it would be a 1.4 percentage point increase, or $1.3 billion. If one considers *price* increases (rather than Bell's increased income), as explained in footnote one above, this amount could easily be doubled, to $2.6 billion or more. In fact, as mentioned in the text, $2.6 billion in telephone rate increases *have* been filed or allowed in the last three and one-half years by state commissions—over 10% of Bell's current $20 billion annual gross (compared to $18.5 billion in 1971). In short, it does seem fair to me to characterize the impact of today's decision as in the nature of $1.3 billion price rise for consumers.

ing to heed the recommendation of the Administrative Law Judge in this case, and abandon its excessive demands, Bell *still* endeavors to have this Commission enact them. No doubt even today's decision, so unjustifiably favorable to Bell's position, will be met with hand-wringing and bad-mouthing by the company.

I do not understand the majority's discussion of Bell's capital structure and construction program. Both were seriously flawed; consumers paid more (probably $100s of millions more); but Bell is not to be penalized in any way. As usual, the consumer is simply asked to pick up the tab—while stock prices and management's salaries go up—and is expected not to complain. In paragraph 100 the majority promises ever-vigilant scrutiny, analysis and action. It does not indicate, however, how long we must wait to witness such a novel approach from this Commission.

It is even more difficult to justify the majority's unwillingness to make an adjustment for Western Electric's excessive earnings. The majority appears to concede the validity of such an adjustment—but says it can be considered "later." It is really very simple. The majority is determining what the cost of capital (rate of return) should be for the entire Bell system. The majority decides that is 8.5 to 9.0%, I believe this to be too high. But let's accept it for a moment. Western Electric is a part of the Bell System. It contributes to its overall return. The return for Western Electric, however, was 11.59% in 1970, 10.07% in 1971, and, so far in 1972, 9.83%. If the required return for the overall Bell System is 8.5 to 9.0% and Western Electric is making significantly more than the System requirement, then the other components of the Bell System—like interstate service for consumers—should earn *less*. Otherwise the overall Bell System rate is even *more* than the high 8.5 to 9.0%—Bell reaps a windfall. But the majority says it will get around to that problem "later."

So much for the Trial Staff's efforts to add a little reality. It was a good fight. They are entitled to consumer's appreciation. But they've lost. Now let's examine what we're doing for inflation.

The trial record in this case was closed on June 3, 1971—two months before the "New Economic Policy" was announced. The Commission did hold a little oral argument in this case later on, in October, 1971, but our entire record was built on the premises and experience of the very period of inflation which led directly to the imposition of controls. The majority's additional oral argument in September, 1972, merely delayed our decision beyond the national election, added little but confusion, and further underscored the need to reopen the record. Bell came in and hollered for more money when it thought it had the best case.

It is not just that a year and a half has passed since the closing of this record that makes it so stale. It is that the Administration's economic policy has undergone such revolutionary change during this period, and that none of these changes have been explored on the record. If the majority is so all-fired eager to increase Bell's profit, one would think the least it could do would be to get a current record before it. The decision tries manfully to fill in the data about what has happened since June, 1971—operating results, interest rates, and so forth—but it is a mechanical exercise. I believe any rate increase

requires that we simply must remand this case to the Administrative Law Judge to receive evidence on post-June, 1971 issues.

One of Bell's—and the majority's—major concerns has been the price of ATT stock. But recently we have seen a dramatic rise in ATT stock price, from a 1972 low of 41 to a present level above 50—a 25% increase. But this fact has had no impact on the majority's conclusion, reached months ago and announced now.

Not content simply to raise rates, the majority tells Bell that as it continues to earn more and more above the "minimum" of 8.5%, that will be all right with the FCC—up to 9.0%. After that, sometime, maybe—although maybe not—the FCC might want to ask whether Bell is earning too much. But, in effect, Bell has a blank check to earn more and more at the expense of the consumer—and the FCC promises to do nothing about it. Of course, the majority purports to qualify that by saying the increase should be from improved efficiencies and productivity. I would be delighted if the majority would enlighten us with its criteria for separating rate of return increases brought about by efficiencies and productivity from those created by improved business conditions, stimulated demand, and rate error or calculated miscalculation. In fact, I would even settle for a willingness to fail to reward Bell for past inefficiencies, errors in judgment, and excessive conservatism—which the majority indicates it won't do. The fact is that Bell has today been handed a blank check by the FCC, drawn on the account of the American consumer.

There is little I need to add to the discussion of the numerous and unwieldy carts that have been harnessed before this balky horse. It is nothing short of amazing that this agency has been able to conduct two major AT&T rate of return proceedings while being unable to finish either the ten-year-old proceeding to decide whether the average citizen is paying too much for interstate service while special users get a rate subsidy, or the proceeding begun in 1965 to determine the appropriateness of Bell's costs—which are most of what the ratepayer actually forks over. My view now is that nothing in this agency affecting AT&T, except national emergencies, should budge one more inch until these moss-covered proceedings are cleaned up and finished off. To this extent I agree with the views of MCI in this proceeding. Of some $400 million a year in increases more or less approved by this decision, $175 million are already being paid by small users, $36 million are paid by special users, and the additional $290 million can be allocated in Bell's discretion—probably to fall, once again, on John Q. Public. My first choice would be to defer this rate of return proceeding until those two dockets are finally resolved. My second choice would be merely to remand this case for up-to-date information.

There is little to add on the effect this decision will have on all kinds of utility rate payers. Bell, and other telephone companies, will try to use the 8.5 to 9.0% result to influence other regulatory bodies. See the views of the Commonwealth of Pennsylvania at the September 1972 oral argument. Tr. 5550. Other utilities will cite the majority's decision as precedent. Prices and profits are going up again.

I have saved the most complicated for the last. The ultimate responsibility for controlling price increases—including telephone price increases—rests with the Price Commission. The Price Commission has

done a lot of moving around on its regulation of utilities, as I have detailed in another opinion, ____F.C.C. 2d____, FCC 72–441 (May 19, 1972), and Price Commission rules were changed again just before the September 1972 oral argument. 37 Fed. Reg. 18893 (September 16, 1972).

The Price Commission provides for two kinds of utility price increases in its rules—"interim" rates and "final" rates. Interim rates are those increases allowed while the regulatory agency evaluates issues related to the increase.

I believe this Commission should evaluate its decision in the light of the Price Commission rules and standards. During the September oral argument I asked, and Bell and the FCC Trial Staff agreed to provide, record citations to the material they believed demonstrated compliance with Price Commission standards—many of which were established *after* the close of this record, Tr. 5502.

Bell, in a letter dated November 15, 1972, has now supplied its response. Bell says it will file the required certificate of compliance once the Commission's decision is issued. Bell points to the record developed before the Price Commission ever came into existence for evidence of its compliance with Price Commission criteria. It is apparently Bell's position that the Price Commission criteria add *nothing* to the traditional standards used by the FCC in judging rate of return cases. The majority accepts Bell's views in its cursory comments on the Price Commission in paragraphs 110 to 113 of the majority opinion.

Bell also argues that neither the FCC nor the Price Commission is permitted to review this decision under the Price Commission rules. These are "interim rates" argues Bell, and thus are immune from scrutiny. Again the majority appears to agree. Bell's argument raises another interesting question. This FCC decision is an "interim" decision and the rates are "interim rates" because of an administrative quirk. That quirk is the Commission's inability to conduct a full hearing on the Bell system—a hearing that has been underway since 1965 at least. And since those other issues are encompassed in Phase II of the present proceeding, this FCC decision leaves the rates on an "interim" status.

But it is important to point out how much *like* "final" rates the profit levels allowed in this decision are. First, "interim rates" suggest rates that will be in effect for a short period of time—say, less than a year—until a final decision is made. Here there will be no "final rates" for years—at least two years, probably longer, perhaps never. There will be no decisions in the cross-subsidy proceedings for at least one year, according to current predictions, and those predictions have been notoriously optimistic in the past.

Secondly, the "interim" profit rate approved here is, in fact, a "final" rate. The question of rate of return is now settled on this record in a final decision. That approved profit rate for Bell is now 9.0%. Other decisions on the remaining issues—issues that make this an "interim" decision—may affect *which* consumers contribute the profits, and what costs Bell can include in its expenses before computation of profits. But *nothing* yet to be decided will change the profit rate allowed by the majority here. The Price Commission should not ignore the fact

that, so far as Price Commission rules are concerned, this *is* the "final" decision of the FCC with respect to the criteria established by the Price Commission for measuring the action of regulatory agencies on the question of rate of return.

Price Commission rules require Bell to submit in writing a statement as to how the increases approved here comport with Price Commission guidelines. 6 CFR § 300.307(c)(2) (1972). The discussion of the Price Commission requirements at the September 1972 oral argument can best be characterized as totally confused—as any cursory examination of the transcript will demonstrate. The majority deals with Price Commission questions in a rather offhand way—understandable since the document issued here is little more than a copy of a July 1972 draft with the numbers inserted. The July 1972 draft was prepared before the new September 1972 Price Commission rules.

Interim rate increases are reviewed by the Price Commission. 6 CFR § 300.307(c)(1) (1972). Interim increases must be suspended for "the maximum period allowed by law." 6 CFR § 300.307(c)(1) (1972). Except for certain special situations not relevant here, interim increases may not go into effect unless they have been suspended for the period specified by the Price Commission regulations. Thus it is important to determine the "maximum period allowed by law" under FCC statutory power. As the FCC has made clear in a series of decisions, the "maximum period" can be much more than the 90 day period specified in section 204 of the Communications Act. See FCC 72-118; FCC 72-619.

In its last decision, the FCC determined that its January 1971 action was a "suspension"—which has lasted 22 months. See — F.C.C. 2d —, FCC 72-942 (1972). And the FCC's special permission decisions, relying on Sections 4(l), 4(j) and 203(b), affecting aspects of this case, indicate that the "maximum period" is in fact however long it takes for the Commission to consider in good faith the important issues that affect a rate increase of the magnitude under consideration here. I have already argued that the Commission must decide questions of cross-subsidy and Bell costs before granting a further massive price increase. I am convinced that the FCC not only can but should continue its present suspension in effect until those issues are decided—and that the period of time to consider these matters is the "maximum period allowed by law" under Price Commission regulations. And I am convinced that under Price Commission rules that is what we must do to comply with those rules.

I do not believe the Price Commission legally can permit this FCC decision to become effective—unless it is willing to violate its own rules, and abdicate its responsibility. The 8.5 to 9.0% rate of return permitted today is procedurally, and substantively, in violation of Price Commission rules.

On substantive grounds a 8.5 to 9.0% rate of return for Bell violates the Price Commission criteria. The Price Commission criteria for permissible rate increases are:

(1) The increase is cost-justified and does not reflect future inflationary expectation;

(2) The increase is the minimum required to assure continued adequate and safe service or to provide necessary expansion to meet future requirements;
(3) The increase will achieve the minimum rate of return needed to attract capital at reasonable costs and will not impair the credit of the public utility;
(4) The increase does not reflect labor costs in excess of those allowed by Price Commission policies;
(5) The increase takes into account expected and obtainable productivity gain, as determined under Price Commission policies. 6 CFR § 300.303 (1972).

The FCC and Bell may or may not be willing to vow that these criteria have been met. But the record in this case can only lead to the single conclusion that they have not.

Only a rate of return around 8% can meet the Price Commission criteria. That is the conclusion of both the Administrative Law Judge and our Trial Staff in this case, which found 7.9 and 7.75%, respectively, to be the appropriate floor. The majority offers nothing but conclusionary statements to challenge that view in adopting 9.0% as its upper range. The majority has made no effort to lay the evidence in this case alongside the Price Commission criteria. This failure in itself demonstrates the majority's willingness to ignore economic stabilization policies.

I also note the majority has already concluded that the rate increases to follow this decision will be permitted to go into effect immediately, without suspension. The majority has argued that our January 1971 action constituted a suspension of the increases now to be filed. I need not repeat my arguments as to why the January 1971 action was in fact not a suspension, either under FCC authority or the Price Commission rules. —— F.C.C. 2d ——, FCC 72-942 (1972), and that therefore any new increases must be suspended for the "maximum period allowed by law."

This case must be decided on the record before us. I believe that record can sustain no more, at the outside, than 8% at this time. To the extent exterior standards *are* consulted, however, they tend to reinforce my conclusions, rather than those of the majority. Moreover, by torpedoing the efforts of the State Commissions to hold to lower rates of return, we are gratuitously giving a billion-dollar boost to rampant inflation that it scarcely needs.

This is a somewhat lengthy opinion to explain a short conclusion: this agency is not helping the consumer; it is not helping the fight against inflation; it is not keeping price increases to a minimum; it is not applying what I understand to be the applicable principles of public utility law. It is merely helping a politically powerful corporation—perhaps the world's largest—to acquire $1 billion a year more from hard-pressed American consumers.

I dissent.

Dissenting Statement of Commissioner H. Rex Lee

It is extremely difficult to assess the actual impact of the majority's decision to authorize the highest rate of return on interstate and foreign communications services provided by the American Telephone

and Telegraph Company. To recite that the Bell System is now permitted to return between 8.5 and 9.0 percent in net earnings after federal income taxes on its total investment (rate base) or that AT&T may now file tariff revisions in order to generate $145 million in additional interstate revenues is somehow not a very meaningful way to gauge the economic, social and political implications of the rate of return decision. It is more than obvious that the Commission's regulatory actions in regard to the telephone industry are of vital importance to every citizen who finds telephonic communications to be a needed, daily utility service. Because of its impact in terms of sheer scope and size, the decision to fix an increased rate of return for AT&T's interstate and foreign operations is also of extreme importance in the context of the President's current efforts to control inflationary pressures in the American economy. However, whatever the long-range effects of the majority's decision may be, we can be assured of one predictable outcome—telephone users will have to pay more to communicate with one another. It is because of the magnitude of the expected rate increases and the probable impact of the majority's Phase I decision on local telephone rates that I have dissented.

Our statutory mandate in telephone regulation is simply stated—the public interest is best served by the establishment of the *minimum* rate of return consistent with a fair return to company stockholders and the maintenance of optimum service. The implementation of the mandate is not quite so easy, for we cannot know beforehand what exact effects a rate of return decision will have in such areas as quality of service, range of prices, management incentives and the introduction of new equipment and innovative techniques. In the recent past, we have witnessed substantial decreases in interstate telephone rates as a result of increased demand and technological efficiencies. However, economic conditions have changed dramatically since the Commission's *Interim Decision and Order* in Docket No. 16258, 9 FCC 2d 30 (1967), which specified that AT&T should maintain interstate earnings to produce a return within a range of 7.0 to 7.5 percent. In fact, as a result of our continuing surveillance of the Bell System's interstate operations, we subsequently noted significant changes in the economic climate that affects AT&T's revenue requirements and its ability to attract new capital (*i.e.*, the sharp increase in interest rates on borrowed capital, the resulting increase in the company's cost of embedded debt, the higher rate of inflation and larger capital requirements), and, in 1969, we authorized the Bell System to exceed the upper limit of the range (7.5 percent) specified in 1967. See 21 FCC 2d 654 (1969). Ironically enough, these same economic conditions eventually prompted the President's August 15, 1971, freeze on prices and wages, the announcement of a New Economic Policy (Phase II) and the establishment of a Price Commission pursuant to the Economic Stabilization Act of 1970.

Therefore, I am somewhat sympathetic with AT&T's contentions that it needs to improve its earnings position in order to attract the needed equity capital for plant expansion without an impairment of existing stockholders' interests and that the sharp decline in the company's interest coverage must be arrested to avoid a downgrading of its debt issues. Nevertheless, I cannot accept AT&T's position that it

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should have the same or greater interest coverage than the Aaa electrics or that an equity return of 12.5 percent is needed to sustain an adequate interest coverage for the Bell System. As the majority properly notes, AT&T's debt ratio continues at a level lower than that of the electric utilities, and, as a result, its equity holders are subject to less risk than the shareholders of the Aaa electrics. Thus, it would not be fair to the Bell System rate payers to require them to pay the additional amounts necessary to enable the telephone company to earn the same return on equity as the Aaa electrics. Nevertheless, as AT&T's market price/book value ratio has adequately demonstrated,[6] equity earnings appear insufficient to attract needed capital on fair terms, especially in light of the current cost of long-term debt, *i.e.*, 7.25 to 7.50 percent.[7] Since debt costs have increased by about 1¼ to 2 percentage points since 1967 and since the spread between debt costs and equity return narrows as interest rates rise, an appropriate return on equity for the Bell System would be in a range between 10.0 and 10.5 percent.

Based on the updated figures supplied by AT&T in August,[8] and utilizing a 10.0 percent return on equity, the indicated overall return on the Bell System's interstate and foreign operations may be computed as follows:

[Figures in percent]

Item	Proportion of capital	Cost rate	Proportion of total cost
Debt	46.50	6.01	2.79
Preferred	3.82	8.09	0.31
Equity	49.68	10.00	4.97
Total			8.07

If return on equity is fixed at 10.5 percent, then the overall rate of return would be 8.32 percent. Unlike the majority, I would not increase the equity return in order to accommodate the cost of convertible preferred stock issued in 1971 since such an approach appears to favor the use of preferred stock financing. The primary responsibility for financial planning rests with the Bell System management and not with the Commission. I do agree with the majority's use of an "actual" debt ratio rather than a hypothetical structure, but I would employ the most current data available in this regard, which indicates a Bell System debt ratio of 46.5 percent as of June 30, 1972.

Contrary to the majority's position, I would make a downward adjustment in the computed rate of return to compensate for AT&T's

[6] During 1972, the average market price of AT&T stock fell below the average book value. Lately, AT&T common stock has witnessed marked improvement, which apparently reflects an increased quarterly dividend and the company's expectation of favorable regulatory actions on the federal and state levels.

[7] Equity earnings for the Bell System were 9.2 percent in 1970, 8.9 percent in 1971 and 9.0 percent in 1972 (annualized on the basis of the first six months of operation).

[8] The Commission scheduled an oral reargument in Phase I of Docket No. 19129 for September 19, 1972, in order to take account of relevant financial and operating data applicable to the period subsequent to the close of the hearing record on June 3, 1971, and of pertinent Price Commission regulations. Pursuant to a request of the Common Carrier Bureau Trial Staff of August 3, 1972, AT&T supplied updated data concerning the Bell System's current cost of long-term debt, its embedded cost of debt, its current capital structure and its most recent operating results. Even though the updated data is noted by the majority, the overall rate of return is computed on the basis of stale record evidence.

earnings from Western Electric, its manufacturing subsidiary. AT&T's return on its investment in Western Electric amounted to 11.59 percent in 1970, 10.07 percent in 1971, and 9.83 percent for 1972 (annualized on the basis of the first nine months). While the majority appears to accept the logic of such an adjustment, it defers any appropriate action until conclusion of Phase II.[9] Since the actual return received by AT&T from its investment in Western Electric is identifiable and should be considered in assessing the telephone company's overall rate of return on interstate and foreign operations, I would adjust the allowable return accordingly. Moreover, I would not specify a range of return by which to measure the reasonableness of AT&T's future earnings and revenue requirements. Consistent with our statutory mandate and Price Commission directives, it is sufficient to fix the minimum allowable rate of return and to reserve further action by the Commission when and if the Bell System's earnings exceed the minimum rate of return. The majority's specification of a range of 8.5 to 9.0 percent appears to foreclose appropriate Commission action if earnings of AT&T within that range should result from factors other than efficiencies and productivity gains. In addition, since the majority has not seen fit to penalize the Bell System for management errors affecting the company's capital structure and construction program during the 1966–1970 period, it should not now offer rewards in the form of a higher rate of return.

Therefore, I would find that the *minimum* rate of return on AT&T's interstate and foreign operations should be set somewhere between 8.07 and 8.32 percent—with an appropriate adjustment downward to reflect Western Electric's contribution to company earnings. I am fearful that the majority's range of return will be interpreted by AT&T to mean that it can return *at least* 9.0 percent on interstate operations. At that level, the majority's decision would permit the Bell System to generate additional interstate revenues of at least $540 million [10] and to earn nearly 12.0 percent on equity investment. Such a return on interstate operations, I believe, would reflect economic expansion generally rather than Bell System efficiencies and productivity and could have serious inflationary impact as a result. I am also concerned that our action will constitute the major precedent for state regulatory agencies in their evaluation of telephone company requests for higher returns on local operations. The Bell System has already been granted permission to initiate well over $1 billion in rate increases by state commissions, and it presently has pending an addi-

[9] The second phtse of Docket No. 19129 calls for an examination of those matters that could affect the revenue requirements of AT&T and the associated operating companies, including the reasonableness of the prices of Western Electric and the amounts claimed by the Bell System for investment and operating expenses. Phase II also encompasses an examination of the interstate rate structure of MTS (message toll telephone service). The Phase II issues were dismissed by the Commission on December 21, 1971 (32 FCC 2d 691—Commissioners Nicholas Johnson and H. Rex Lee dissenting), but were subsequently reinstituted on January 27, 1972. See 33 FCC 2d 269 (1972).

[10] In January, 1971, we permitted AT&T to increase its net earnings before taxes by $250 million pending the outcome of the hearing on the company's November 20, 1970, tariff proposals, as revised. In its decision, the majority projects an 8.0% earnings level for the Bell System for the immediate future even though the company's current earnings level is only 7.69 percent. If we assume that about $29 million in additional net income is required to increase AT&T's interstate earnings ratio by one-tenth of one percentage point, and we assume an earnings level of 8.0 percent, achievement of a 9.0 percent overall return would require upward rate adjustments to produce another $290 million. If AT&T's current earnings level of 7.69 percent is used to project revenue requirements, then income must rise by some $377 million in order to achieve a 9.0 percent return.

tional $1 billion in proposed rate increases on the local level. From any point of view, the majority's decision can be expected to have a profound impact on both interstate and local telephone charges.

The majority takes the position that the currently effective MTS rates, which went into effect on January 26, 1971, are not subject to the President's new economic program, but that any rate proposals submitted pursuant to the rate of return decision are. Nevertheless, since the anticipated rate increases will be below the level of those filed by AT&T in November, 1970, the majority concludes that the Price Commission's general requirement for maximum suspension of interim rate increases has been met. I have already had occasion to comment on this aspect of the majority's decision in the context of AT&T's request for special permission to resubmit its original $545 million interstate rate increase proposal. See FCC 72–942, 25 RR 2d 692, released October 26, 1972. As I explained in my prior statement, the voluntary postponement of the effective date of the 1970 tariff filing by AT&T did not constitute a "suspension" within the meaning of the Communications Act or of Price Commission regulations. The majority's contrary interpretation is clearly erroneous and only serves to undercut the role of the Price Commission in the implementation of NEP guidelines. In fact, the majority has made no serious attempt to view its rate of return decision against the backdrop of current economic stabilization policies. Its discussion of applicable Price Commission regulations is cursory at best and offers no assurance that the 8.5 to 9.0 percent range of return specified for Bell System interstate operation is consistent with efforts to control inflationary pressures in the economy.

In summary, while I believe that some upward adjustment of AT&T's rate of return is justified in order to accommodate changes in the cost of debt and equity capital since 1967 and to insure that sufficient funds are available for construction of facilities, I cannot agree with the decision to permit AT&T to return up to 9.0 percent on interstate operations. The range of return adopted by the majority is inconsistent with the hearing record, the recommendations of the Administrative Law Judge and the Trial Staff, updated Bell System statistics and the goals of the NEP. Based on AT&T's *current* earnings level, the telephone company will apparently be permitted to generate additional net income before taxes of $627 million, including the $250 million already allowed, and it can be expected that the major burden will fall on the MTS user. The majority's decision will have serious impact on local rate proposals that are now pending before state commissions. It also proposes to reward Bell System management for efficiencies and productivity gains, but rejects any attempt to penalize the company for past mistakes in regard to capital structure and construction programs—presumably on the theory that the Commission acquiesced in such corporate decisions. It fails to reflect the contribution of Western Electric to AT&T earnings and, to that extent, enables the company to earn income on an inflated rate base. While I am most anxious to insure the maintenance of quality service by AT&T, I am not willing to allow the Bell System to work within, and perhaps without, a range of return that can only have a serious impact

on rate payers and a deleterious effect on the President's anti-inflation program.

For these reasons, I dissent.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

I wish to stress at the outset that, since I arrived in July as the newest member of the Commission, I have constantly pondered the matter of AT&T's requested rate increase and experienced reservations as to whether I (or anyone for that matter) had absorbed sufficient information to vote on the matter at all.[11] However, upon review of the record—and a growing conviction that a Commissioner has an affirmative, official duty to participate in major decisions—I am now confident that I possess sufficient understanding of the economics involved to cast an informed vote.

That said, I would secondly note the obvious point that the simplest and easiest way would be to pose as the great saviour of the people and oppose any rate increase. Such a posture is obviously a crowd pleaser. But it is irresponsible government in terms of sound utility regulation. The law, namely 47 U.S.C. § 205(a), requires an infinitely more difficult determination; the prescription of "just, fair and reasonable" rates and practices.

It is clear that denial of a "reasonable" rate of return to AT&T, with a consequent impairment of ability to raise money in the competitive capital market, must lead to a deterioration of service, efficiency, and ultimately higher rates to the subscriber. As always, this affects most those least able to pay; those dependent on everyday telephone service and without the means to benefit from more costly communications alternatives, those without the affluence to travel. Insufficient capital must also result in curtailment by the company of recruitment and training programs so essential to the upward mobility of the socially and educationally disadvantaged. When considered against the scale of a giant employer like AT&T, the effect would be profound. Construction and research and development (most necessary to bring into being better and cheaper communications methods) likewise suffer financial asphyxiation. But, I share the view of the Administrative Law Judge, the trial staff, and a number of experts testifying in this proceeding that the 9.5% rate of return urged by AT&T is not necessary to avoid the foregoing results.[12]

On the other hand, the interim increase hereby permitted is subject to our determination in Phase II of this proceeding and our findings in Docket 18128, with appropriate refunds to subscribers should we deem these rates excessive. Moreover, should it develop that the permitted rate of return yields undue profits after the closing of the pending proceedings, the Commission is statutorily obliged to seek rate reductions as it has done in the past.[13]

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[11] I made this position clear three months ago when I concurred in designating this matter for limited oral re-argument (FCC 72-662 [Mimeo No. 80035] released July 24, 1972. —— FCC 2d —— (1972)) so as to afford me an opportunity to gain maximum exposure to the pertinent facts.

[12] The authorized rate increase is expected to result in some $290 million less than the $546 million AT&T contends is imperative.

[13] See, e.g., the $150 million dollar rate reduction negotiated in 1969, 21 F.C.C. 2d 654.

As a last word, and as acknowledged in the majority opinion, the pricing-out of the tariff rates calculated to produce the authorized rate of return, is in the first instance, at the discretion of AT&T.[14] But, the latitude provided by the Commission in not requiring symmetrically proportional increases so as to minimize the impact of the rates on the average and below-average income telephone subscribers is of primary concern to me. Across-the-board increases of the same magnitude, work the greatest hardship on the poor, as all of our progressive tax structures explicitly recognize. Fifty cents a month represents a great deal more to those at the povery level than to let us say, a corporate executive. Hence, I will be looking at AT&T's sensitivity to these patent mathematics when its revised tariff schedule is filed.

[14] Pricing-out is the schedule apportionment of which types of calls (e.g., direct-dial, operator-assisted, day, night, weekend, etc.) will cost most, less, as well as the dollar amount of such changes.

F.C.C. 72R-342

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BANGOR BROADCASTING CORP., BANGOR, MAINE	Docket No. 19165 File No. BPH-6863
PENOBSCOT BROADCASTING CORP., BANGOR, MAINE For Construction Permits	Docket No. 19166 File No. BPH-6916

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 28, 1972)

BY THE REVIEW BOARD:

1. This proceeding, involving the mutually exclusive applications of Bangor Broadcasting Corp. (Bangor) and Penobscot Broadcasting Corporation (Penobscot) for a new FM broadcast station on Channel 225 at Bangor, Maine, was designated for hearing by Commission Order, FCC 71-220, 36 FR 5154, published March 17, 1971. Subsequently, by Order released January 28, 1972 (33 FCC 2d 677, 23 RR 2d 711), the Review Board enlarged the issues in this proceeding to include, *inter alia*, anti-competitive conduct, concentration of control and cross-interest issues with respect to the Bangor application. On March 2, 1972, Penobscot served written interrogatories on Bangor designed to obtain information relating to the added issues. Dissatisfied with the responses received from Bangor, which were in the nature of general objections, Penobscot moved, on April 10, 1972, for an order to compel answers. At a prehearing conference held on May 19, 1972, and by Order, FCC 72M-767, released June 13, 1972, the Administrative Law Judge effectively denied this motion. Penobscot and the Broadcast Bureau have filed appeals from this adverse ruling.[1]

2. These interlocutory appeals grow out of the following circumstances. In its Order released January 28, 1972, the Board, in adding an anti-competitive issue, relied, *inter alia*, upon the following allegations: that Melvin L. Stone, owner of Bangor, is also the owner of the Lobster Network, a sales representative firm which sells time on Maine radio stations, and the owner of two member radio stations; that the Network sells time on the stations in combination and offers discounts; that member stations' salesmen serve as Network salesmen; and that three of the Network stations are in one-station markets. In adding a concentration of control issue, the Board pointed out that Stone owns two radio stations which are members of the Network and thereby can be sold jointly; that Stone owns 50% of one Maine FM station and is a creditor of one Maine AM and one Maine TV station; and that he

[1] Both appeals were filed on June 20, 1972. No opposition has been filed by Bangor to either pleading.

intends to sell the proposed FM station in Bangor along with present Network stations. The Board also concluded that allegations regarding Stone's dual interests in a sales representative firm and a proposed broadcast station serving the same general area raised questions concerning the principles underlying the Commission's cross-interest policy. Following release of this Order, the serving of Penobscot's interrogatories, the general objections by Bangor, and the motion for an order to compel answers by Penobscot, a prehearing conference was convened to discuss these matters on April 21, 1972. Thereafter, on April 28, 1972, Penobscot moved for an immediate ruling on its motion to compel answers which was in turn discussed at another prehearing conference held May 19, 1972. At the latter session, the Presiding Judge denied Penobscot's motion to compel answers, ruling that the interrogatories were too broad in scope. (Tr. 382.) He did order Bangor to produce more limited information. (Tr. 383; see also Tr. 344–6.) Thereafter, by Order, FCC 72M–767, released June 13, 1972, the Judge repeated that Penobscot's interrogatories were too broad in that they "seek minute information as to the amount of time sold, the amount of money received as well as present and potential customers." He stated that Penobscot could not act as "a private Attorney General with power to obtain data which would be of tremendous economic value should Penobscot prevail in this proceeding." The Judge instead directed Bangor to produce

> * * * all prior rate cards of the network, data relating to distribution of information relating to the network, the extent to which any single member has or has had the right and power to set his own price or rate for a single spot or any combination of spots, and whether he was restricted in any way, shape or form in selling alone or through a third party, namely, the network.

The presently pending appeals ensued.

3. In its appeal, Penobscot initially points out that, whereas the Judge's Order directed production of certain information, this direction originated with the Judge and the information differed significantly from that which Penobscot sought in its interrogatories. Penobscot states that despite what it conceives to be this erroneous ruling on discovery, its primary concern on appeal flows from the following language taken from the Judge's Order:

> Counsel may assume that, in the absence of a Commission precedent applicable to the situation here involved, the ruling of the Hearing Examiner on the admissibility of evidence offered at the hearing will be consistent with those made in this order.

Such a construction at hearing, Penobscot argues, would preclude compilation of a complete hearing record under the antitrust and concentration of control issues. Specifically, Penobscot claims, examination of the transcript of the last prehearing conference makes clear that the Judge views the new issues added by the Board to be comparative rather than disqualifying, that he will not allow evidence which sounds in antitrust on the theory that the Board had not intended such matters to be considered and the information the Judge did order produced has little or no bearing on antitrust conduct or concentration of control. To establish the relevance of the interrogatories it did submit, Penobscot attaches its motion for an order to compel answers and its comments on the objections to the interroga-

tories by Bangor. Penobscot urges that the Judge has misunderstood the scope of the issues added by the Board and requests that the Board review the transcript of the last prehearing conference as well as the Judge's Order in light of Penobscot's pleading. Penobscot requests that, should the Board's review so warrant, it give additional direction to the Judge with respect to these issues so as to assure compilation of a complete hearing record. Penobscot concludes, however, that in the interest of avoiding delay, it does not press interlocutory review of the Judge's discovery ruling at this time.[2]

4. In its appeal, the Broadcast Bureau endorses Penobscot's concern with the Judge's statement that his rulings on the admissibility of evidence at the hearing will be consistent with his discovery ruling. The Bureau believes that the Judge has mistakenly interpreted the issues added by the Board too narrowly. That is, the Bureau posits, the Judge has oversimplified the origin of the added issues, as well as failed to consider their plain meaning. Examination of the Board's Memorandum Opinion and Order makes clear, in the Bureau's view, that the antitrust and cross-interest issues derive not only from the media ownership interests of Melvin Stone in the state of Maine, but also, *inter alia*, from aspects of the operations of the Lobster Network which might constitute price fixing and unfair competition; questions are raised, for example, regarding the policies underlying the antitrust laws and the Commission's multiple ownership rules. Furthermore, contrary to the Judge's interpretation, the Bureau submits, the scope of these issues clearly extends to Bangor's basic qualifications to be a licensee and is not limited to Bangor's comparative qualifications under the diversification criterion. The Judge's erroneous interpretation of the issues, in the Bureau's view, stems either from irrelevant and speculative considerations or from disagreement with the Board's decision to add these issues in the first instance. Finally, the Bureau states that precedent relied upon by the Judge to support his conclusions is erroneously used. In sum, the Bureau specifically appeals that portion of the Judge's ruling which limits the admissibility of evidence offered at the hearing, and suggests, should the Board agree with the Bureau's position on the scope of the issues, that the Board remand Penobscot's discovery motion for further action by the Judge in light of the Board's directive.

5. The Review Board is constrained to agree with the appellants that the Administrative Law Judge has too narrowly construed the scope of the issues added by the Board in its January 28, 1972, Order. Although we believe the wording of the issues themselves is clear, reference to the underlying discussion should resolve any doubts that may exist. See, *e.g.*, *Media, Inc.*, 26 FCC 2d 972, 974, 20 RR 2d 684, 687 (1970). Pursuant to adequate and substantial allegations (see para. 2, *supra*) and on the basis of clear Commission precedent, the Board at paragraphs 6 and 7 of its Order directed that Stone's basic and com-

[2] At the time Penobscot filed its pleading, the evidentiary hearing herein was scheduled for July 25, 1972, and Penobscot was concerned that there would be insufficient time for a Board ruling and for meaningful discovery prior to hearing. Hence, Penobscot expressly reserved its rights on the matter of discovery until such time as exceptions may be taken to the Judge's Initial Decision. Subsequently, the Judge, by Order, FCC 72M–887, released July 12, 1972, postponed hearing pending the Board's ruling herein. We shall, however, honor Penobscot's request and treat it essentially as a plea for further instructions regarding the scope of evidence to be adduced pursuant to the added issues.

parative qualifications to be a licensee be examined in light of an evidentiary hearing inquiring into those aspects of the operations of the Lobster Network "which might constitute price fixing and methods of unfair competition." The Board emphasized the Commission's longstanding policy to preclude broadcasters from engaging in activities violative of the nation's antitrust laws. Furthermore, at paragraphs 8 and 9 of our Order, we pointed out in some detail our concerns with respect to the public interest questions raised by the allegations relating to concentration of control and cross-interest. See also para. 2, *supra*. On the basis of the plain wording of the pertinent portions of our earlier Order, we cannot concur in the Presiding Judge's apparent reluctance, as evidenced by his June 13, 1972, Order, as well as his comments at the April 21 and May 19, 1972 pre-hearing sessions, to allow an unrestricted trial of the matters in issue. In light of the fact that neither appellant presses upon us review of the Judge's discovery ruling, but stresses instead disagreement with that portion of his Order which would narrow the scope of admissible evidence at hearing,[3] we need not review the Judge's denial of Penobscot's motion for an order to compel answers to interrogatories at this time. Rather, we hold simply that the Presiding Judge must proceed at hearing in such a manner as to allow all parties to fully explore the questions in issue as set forth in our earlier Order, and as clarified herein, so as to assure the compilation of a complete hearing record.[4] Therefore, in accordance with the Bureau's suggestion, the Judge's discovery ruling is remanded to allow him to decide how to proceed prior to hearing. We believe the parties and the Judge can best decide whether to proceed further with discovery and, if so, the scope of such discovery, in light of our ruling that every opportunity be afforded the parties at hearing to fully develop the matters put in issue by the Board in accordance with the language of the specific issues and the underlying discussion.

6. Accordingly, IT IS ORDERED, That the Conditional Appeal From Ruling of the Presiding Hearing Examiner and Request For Instructions to the Hearing Examiner, filed June 20, 1972, by Penobscot Broadcasting Corporation, and the Appeal From Adverse Ruling of Hearing Examiner, filed June 20, 1972, by the Broadcast Bureau, ARE GRANTED to the extent indicated in this Opinion, and ARE DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[3] These appeals amount to requests for clarification of the hearing issues which ordinarily is a matter initially for the Presiding Judge to rule upon. *Western Connecticut Broadcasting Co.*, 26 FCC 2d 1019, 20 RR 2d 961 (1970). However, the Judge has already in effect set forth his view of the issues and the resultant disagreement by two of the parties with that interpretation has led to the instant appeals. Thus, we believe that principles of administrative efficiency which would ordinarily dictate that such a request be made to the Presiding Judge—*e.g., Daily Telegraph Printing Co.*, 20 FCC 2d 976, 18 RR 2d 95 (1969)—are inapplicable here, and that this matter is now ripe for our consideration.

[4] Although the Board is inclined to agree with the Bureau that the Judge has incorrectly relied upon our earlier Order in this proceeding, 33 FCC 2d 887, 23 RR 2d 883 (1972) and *Southern Broadcasting Co. (WGHP–TV)*, 34 FCC 2d 908, 24 RR 2d 296 (1972), we believe these precedents relate to that portion of the Judge's ruling dealing with discovery, and, as such, do not necessitate our review at this time.

F.C.C. 72-1048

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FRED P. D'ANGELO, D.B.A. BANNING BROADCASTING CO., BANNING, CALIF. For Renewal of License of Station KPAS	File No. BR-1840

NOVEMBER 22, 1972.

MR. FRED P. D'ANGELO,
D.B.A. BANNING BROADCASTING CO.,
Post Office Box 938,
Banning, Calif. 92220

DEAR MR. D'ANGELO: This is in reference to your pending application for renewal of license for Station KPAS, Banning, California (File No. BR-1840).

The Commission's records disclose that KPAS was last issued a license on November 5, 1965, for a term expiring December 1, 1968. The Commission's records also disclose that application for renewal of KPAS's license was filed September 5, 1968, and that a supplement to this application was filed on August 9, 1971. However, a number of matters have inordinately delayed Commission action on KPAS's license renewal application and, consequently, that application has been on deferred status since December 1, 1968.

By way of brief summary, the Commission has been unable to prosecute your pending license renewal application for KPAS in view of numerous violations of the technical rules governing the operation of standard broadcast stations and your failure to respond to official correspondence related to those violations. It is noted, for instance, that KPAS has been inspected at least five times during the past few years and that, as a result of these inspections, you have been cited for a total of 44 violations of the Commission's rules. Further, although official notices of violation were issued following each inspection, on several occasions you have failed to respond to the violation notice or otherwise answered subsequent requests for additional information relating to those violation notices. For example, on March 16, 1971, you were issued an official notice of violation following an inspection of KPAS conducted on February 3, 1971. While our records indicate that you responded to this violation notice, to date you have failed to respond to a July 28, 1971 request for additional information concerning several of the violations set forth in the March 16, 1971 notice. Similarly, you have failed to respond to an official notice of violation issued on November 29, 1971.

Moreover, since the filing of KPAS's license renewal application, a number of complaints have been filed with the Commission relating to your financial ability to continue the station in operation.

Most recently, the Commission was advised that the Superior Court of the State of California for the County of Riverside entered a judgment against you authorizing the plaintiff to take possession of KPAS's premises for failure to pay rent. We were also advised that the court order provided that the plaintiff could retain all personal property on the station's premises as liquidated damages. These matters prompted a Commission field inquiry, which was conducted in Banning, California from April 27, 1972, through May 2, 1972. This field inquiry revealed that the building housing the station's transmitter and studio was padlocked, that the station was silent, and that the station's equipment had been confiscated pursuant to the above-noted court order. The Commission subsequently learned that all the station's equipment was sold on May 20, 1972.

Section 1.568(b) of the Commission's rules, 47 C.F.R. 1.568(b), provides that failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Further, the Commission has repeatedly held that, in fairness to the listening public and prospective applicants, as well as for the efficient utilization of the spectrum, prolonged periods of inactivity by broadcast licensees cannot be tolerated. *Palladium Times, Inc.*, 6 RR 846 (1950). From the facts before us it is clear that (i) KPAS has been abandoned, (ii) the station's studio and transmitter are no longer in your control, (iii) the broadcasting equipment has been sold, (iv) you have failed to respond to official correspondence or otherwise advise the Commission of your present intentions, and (v) you are incapable of prosecuting KPAS's pending license renewal application and resuming broadcast operations within the foreseeable future. You were, of course, granted a license to operate a broadcast station. Under the circumstances set forth herein however good cause does not exist for continuing in force any semblance of your outstanding broadcast authorization. We have concluded, therefore, that your pending renewal application should be dismissed and that the call letters of KPAS should be deleted. In so concluding, we are not unaware of the fact that KPAS is the only broadcast facility assigned to Banning, California. We will, therefore, give sympathetic consideration to any request for waiver of the current AM freeze on the acceptance of applications for construction permits for new broadcast stations should any be filed for this community.

In view of the foregoing, IT IS ORDERED, That the application for renewal of license filed by Fred F. D'Angelo, d/b/a Banning Broadcasting Company, IS DISMISSED.

IT IS FURTHER ORDERED, That the outstanding authorization for KPAS IS DECLARED FORFEITED, and that the station's call letters ARE DELETED.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-1068

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST BY CITIZENS COMMUNICATIONS CENTER
For Inspection of Annual Financial Reports

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 1, 1972)

BY THE COMMISSION: COMMISSIONERS REID, WILEY AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has under consideration: (a) the ruling on request for inspection of records entered in this matter by the Executive Director on July 24, 1972; (b) a "Petition for Review" of that ruling filed on August 8, 1972 by Metromedia, Inc. (hereinafter "Metromedia," "KTTV," "the station" or "the licensee");[1] and (c) an "Opposition to Petition for Review" filed on September 27, 1972 by the Citizens Communications Center (hereinafter "CCC," "the petitioners to deny" or "the petitioners") on behalf of the National Association for Better Broadcasting, Action for Children's Television, Mexican American Political Association, and the Fair Housing Council of San Fernando Valley.[2]

2. Metromedia is the applicant for renewal of the license issued to Station KTTV-TV, Los Angeles, California. CCC has filed a petition to deny the station's application for renewal and seeks access to its financial reports in order to respond to certain financial allegations made by the licensee in opposing CCC's petition to deny. On July 24, 1972, the Executive Director granted CCC's request to inspect the licensee's financial reports for the years 1969, 1970, and 1971; Metromedia now asks the Commission to review and reverse that ruling. As an alternative to disclosing the station's individual 324's, Metromedia submits the Commission should adopt a "protective order" and make the requested information available in the form of percentages comparing KTTV's finances with those of the other three network stations.

3. Metromedia's basic grounds for review are set forth in its pleading as follows: (1) the Executive Director's Ruling "* * * is in conflict with case precedent and established Commission policy;" and (2) "it

[1] Under Section 0.461(d)(2) of the rules, 47 CFR § 0.461(d)(2), the proper designation for such a pleading is "application for review."

[2] This pleading was filed on September 27, 1971 after the parties, with the approval of the Commission, agreed to additional extensions of time. Metromedia did not file a reply to CCC's opposition.

involves an erroneous finding as to what constitutes a material question of fact." As more fully explained below, it is apparent Metromedia has put in issue the confidential information contained in its annual financial reports for the requested years. In view of this, the Executive Director's disposition of this matter is completely consistent with our holdings in analogous situations and the station's revenues have become a relevant factor in the renewal proceeding.

4. We do not believe it necessary to discuss in detail all of Metromedia's arguments put forth in its "Petition for Review." [3] Several of these were considered and rejected by the Executive Director and the grounds for disposing of them remain valid. The licensee continues to maintain its financial allegations were not intended to place its financial reports in issue and it was only seeking to demonstrate how petitioners had failed to satisfy the statutory requirements for a petition to deny. We have examined the licensee's specific allegations (set out in Attachment 2 to its "Petition for Review") and it is evident they were not confined to arguing the petitioners were advancing unsupported allegations.[4] We realize the petitioners to deny initially attempted to raise the "reinvestment of profit" issue and that such an issue ordinarily is not under consideration in a renewal application proceeding. This is not to say, however, it can never be a consideration in such a proceeding or, as Metromedia appears to be suggesting that Commission precedent will be overturned unless such a standard is first adopted by the Commission pursuant to a rule making proceeding.

In the instant matter, Metromedia does not deny it made assertions about its financial condition and that it requested the Commission to compare its profits to those made by the three network owned stations in Los Angeles. Instead the station argues "* * * verification by the Commission in a 'see also' argument does not open up confidential data to the world," and the Commission can compare the stations' confidential income figures without disclosing them. However, on the basis of Commission precedent, we do not believe Metromedia can state it is adequate for the Commission to examine the figures without disclosing them to its opponents. As the ruling below expressly noted: "The Commission has consistently permitted inspection of such reports in analogous situations when the party against whom disclosure was sought had put them in issue in the proceeding by relying upon confidential information they contained." [5] In addition, as petitioners

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[3] Metromedia contends the wrong standard was used below to evaluate the inspection request. However, because Metromedia argues the request should have been denied under either standard, it is unnecessary to decide whether, for purposes of the Commission's Public Information Rules, there is a difference between a "persuasive showing" and a "most compelling showing." We note that Metromedia's opposition to petitioners' original request spoke in terms of a "persuasive showing" and contended that petitioners had not made the "persuasive showing" required by the rules.

[4] Metromedia's Attachment 2, p. 101, n. *, states the following: Petitioners made reference to the fact that Metromedia has assets in excess of $192,000,000. This is meaningless, its liabilities are completely ignored. Since Petitioners have brought up the subject, the Commission should also examine KTTV's performance in the light of its income picture compared to the huge profits of the three (3) network owned stations."

Attachment 2, p. 110, states the following (footnote omitted): On these pages, Petitioners again resort to surmise as to the profitability of KTTV ("exacting large profits," "siphoning these profits off", etc.). Commission records reflect that this is not the case. They also reflect that the "large profits" in this market are being made by the network owned stations. The rate of return for Metromedia on capital invested in KTTV has been less than the Commission permits a public utility to make.

[5] See Multivision Northwest, Inc., 8 F.C.C. 2d 892, affirmed 10 F.C.C. 2d 391 (1967). Compare Cape Cod Broadcasting Co., 23 F.C.C. 2d 277 (1970) with Sioux Empire Broadcasting Co., 10 F.C.C. 2d 132 (1967).

point out in their opposition, the argument that disclosure is not necessary because the Commission can verify the data involved has been specifically rejected.[6]

5. Further, Metromedia cannot now oppose disclosure by insisting profits were only being referred to in a comparative sense and thus its profits should not be disclosed without disclosure of the profits made by the three network Los Angeles stations. The other stations are not parties to the renewal proceeding and their figures are not in issue. It is evident Metromedia cannot put their confidential data in issue in the way it can with respect to its own financial information.

6. Nor do we see any validity to the licensee's contention that the ruling prevents it from responding effectively to the financial allegations made in the petition to deny. Nothing in the ruling below would preclude the licensee from arguing petitioners' assertions were unsupported and failed to meet the statutory standards for a petition to deny. Nor would the station be precluded from pointing out the Commission has not recognized the "reinvestment of profit" issue as a necessary element in evaluating a renewal application.

7. As for Metromedia's contention that the annual reports do not contain specific information on expenditures for local programming, the test is not the preciseness of the information but whether the station has attempted to rely on it as justification for its programming. For it is only when the licensee attempts to eliminate the financial issue in the first instance by alluding to the constraints of its revenues that its opponents become entitled to examine the confidential data on which the station's allegations are based. Moreover, as the petitioners to deny point out, the information is not being sought to determine the ". . . amount of money spent on local programming or any other specific type of programming," and ". . . it is the overall relation of profitability to programming that is at issue here. The information contained in the Form 324's does provide information as to overall 'Program Expenses.'"

8. Finally, as an alternative approach, Metromedia suggests there is no "reasonable necessity" for disclosure of actual figures because profits and the amounts spent for programming can be given in the form of percentages comparing KTTV–TV's finances with those of the other three network stations.[7] But this argument overlooks the obvious point that Metromedia has asked the Commission to examine specific figures showing its profits and its rate of return on capital investment. In these circumstances, as indicated above, Commission precedent does not permit the licensee to rely on information not available to all the parties. The individual figures are necessary, percentages would not be adequate, and the petitioners are entitled to inspect the same information Metromedia relied upon in presenting its allegations to the Commission.

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[6] *Cape Cod Broadcasting Co.*, p. 279.

[7] If the Commission takes this approach, the licensee also requests a statement to indicate the information was used only in a comparative sense and that ". . . KTTV's figures alone are meaningless in such a context." For the reason given in paragraph 5, *supra*, we believe such language should not be included.

9. Accordingly, IT IS ORDERED, That the "Petition for Review" filed by Metromedia Broadcasting, Inc. on August 8, 1972 IS DENIED and the Executive Director's Ruling of July 24, 1972 IS AFFIRMED. Arrangements for inspection may be made with the Office of the Executive Director

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-343

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JAMES R. REESE, JR. AND JANE M. REESE D.B.A. CLIFTON FORGE RADIO, CLIFTON FORGE, VA.	Docket No. 19489 File No. BP-19057
ALLEGHANY-HIGHLANDS RADIO, INC., CLIFTON FORGE, VA.	Docket No. 19490 File No. BP-19099
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 28, 1972)

BY THE REVIEW BOARD:

1. By Memorandum Opinion and Order, released April 27, 1972,[1] the Commission designated the mutually exclusive applications of James R. Reese, Jr., and Jane M. Reese d/b as Clifton Forge Radio (Clifton Forge Radio) and Alleghany-Highlands Radio, Inc. (Alleghany) for consolidated hearing on several issues against Alleghany, and the standard comparative issue. Both applicants proposed to operate a standard broadcast station on 1230 kHz at Clifton Forge, Virginia.[2] The operation would replace the deleted facilities of Station WCFV, Clifton Forge, which went off the air on March 10, 1971, and whose application for renewal of license was denied by the Commission in a decision released May 28, 1971.[3] On August 28, 1972, the Administrative Law Judge released a Memorandum Opinion and Order (FCC 72M-1081), in which he granted a joint petition for approval of agreement filed by the applicants on July 19, 1972. Pursuant to the agreement, the Judge dismissed the application of Clifton Forge Radio and approved reimbursement of its expenses in the amount of $47,000. Contrary to the Broadcast Bureau's position, the Judge held that "the joint petitioners have demonstrated legitimate and prudent expenses in excess of the $47,000 maximum payment contemplated by the agreement." Now before the Review Board is a partial appeal of adverse ruling, filed September 5, 1972, by the Broadcast Bureau.[4] The Bureau challenges two expense items that were allowed by the Administrative Law Judge, and maintains that the Judge "should have disallowed expense claims in the amount of $2,988.19." The Bureau does not quarrel with any other aspect of the Judge's Memorandum Opinion and Order.

2. Subsequent to the filing of the Bureau's appeal, the Administrative Law Judge issued two documents which should be noted here.

[1] 34 FCC 2d 763, 24 RR 2d 212.
[2] Requests by both applicants for interim operating authority were dismissed by the Commission in the designation Order, 34 FCC 2d at 764, 24 RR 2d at 214.
[3] *Image Radio, Inc.*, 29 FCC 2d 822, 21 RR 2d 1236.
[4] Clifton Forge Radio filed an opposition on September 15, 1972.

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First, on September 19, 1972, the Judge released an Order (FCC 72M–1172) in which he approved a supplement to the applicants' joint petition for approval of agreement. In short, the supplement provides that, in order to permit the hearing on Alleghany's application to proceed, and, at the same time, not to prejudice any rights of Clifton Forge Radio, the parties agreed to place the sum in dispute (*i.e.*, $2,988.19) in an escrow account to await the outcome of the Bureau's partial appeal. Second, on October 4, 1972, the Judge released an Initial Decision (FCC 72D–64), in which he recommended a grant of Alleghany's application.[5] The Judge noted that "the quarrel between the Bureau and Clifton Forge Radio is in no way related to the prosecution of Alleghany's application." "Under no circumstances", the Judge continued, "do the questions raised in the Bureau's Partial Appeal have any bearing or impact upon the prosecution and granting of Alleghany's application. . . ." Initial Decision, paragraph 11.

3. The challenged expense items are: (a) expenditures of $2,402.54 incurred by James Reese, a Clifton Forge Radio partner, in connection with a rejected application for authority to operate the facilities of Station WCFV on an interim basis;[6] and (b) expenditures of $585.65 incurred by Clifton Forge Radio prior to May 27, 1971, the adoption date of the Commission's Decision denying renewal of license of Image Radio, Inc., licensee of Station WCFV. See note 3, *supra*. As for the first expense item, the Bureau requests a blanket ruling from the Board "that Section 311(c) of the [Communications] Act [of 1934, as amended,] does not permit reimbursement for expenses incurred in prosecuting an interim application." With regard to the expenses incurred before May 27, 1971, the Bureau insists that the Judge's ruling "ignores the fact that until the Commission denied [WCFV's] renewal [application] there was simply no facility to apply for." In the Bureau's view, any expenses incurred before May 27, 1971, must be considered "speculative expenses incurred at [the applicant's] own risk, not prudent and legitimate outlays; and, therefore, nonreimbursable." To hold otherwise, the Bureau submits, would mean that Section 311(c)(4) of the Act is "meaningless". In its opposition, Clifton Forge Radio strenuously urges affirmance of the Presiding Judge's allowance of the two disputed expense items.

4. We agree with the Bureau that the Presiding Judge should not have allowed Clifton Forge to be reimbursed for the $2,402.54 expended by James Reese in connection with his unsuccessful attempt to secure Commission authorization to operate a station in Clifton Forge on an interim basis. While legitimate and prudent expenses made in connection with interim applications are not necessarily nonreimbursable *per se*,[7] the expenses incurred by James Reese in connection with his attempt to secure interim operating authority are not reimbursable in this case. "Section 311(c)(3) of the [Communications] Act, and [Section] 1.525(a) of the Commission's Rules, permit

[5] The time for filing exceptions to the Initial Decision expired on November 3, 1972, and no exceptions were filed.

[6] In *James R. Reese, Jr.*, FCC 71–862, released August 25, 1971, the Commission denied James Reese's request for interim operating authority. The Commission stated that it believed "that the better course would be to defer any consideration of interim operation at this time."

[7] See *Great River Broadcasting, Inc.*, 18 FCC 2d 212, 16 RR 2d 669 (1969); *Pike-Mo Broadcasting Co.*, 2 FCC 2d 946, 7 RR 2d 281 (1965).

reimbursement only for expenses incurred in connection with preparing, filing and advocating the grant of the application which is proposed to be withdrawn. Thus, these sections do not authorize reimbursement to the withdrawing applicant for expenses other than those incurred 'with respect to the . . . proposal which is in this hearing.'" *Midwest Television, Inc.*, 4 RR 2d 652, 653 n.3 (1965), quoting *Florence Broadcasting Co., Inc.*, 19 RR 1379, 1380 (1960). *Cf. Dirigo Broadcasting, Inc.*, 5 RR 2d 735, 737 (1965). The Presiding Judge held that James Reese's rejected application for interim authority was "an integral part of Clifton Forge's plan for restoration of service lost when [WCFV] went silent." FCC 72M–1081, *supra* at paragraph 7. He therefore concluded that "expenditures on behalf of the interim application were made in connection with [the] instant application [of Clifton Forge Radio] within the meaning of [Section 311(c) of the Act]. . . ." *Id.* In our opinion, this conclusion overlooks the Board's explicit holding on this matter in *Midwest Television, Inc.*, *supra*, and the incontrovertible fact that the filing of the interim application by Reese was not "necessary to enable [Clifton Forge] to prosecute [its] application" for *permanent* authority on 1230 kHz. *Sidney E. Young*, 6 FCC 2d 450, 451, 9 RR 2d 166, 167 (1967). *Cf. WEPA–TV, Inc.* (*WEPA–TV*), 5 RR 2d 756, 758 (1965); *Dirigo Broadcasting, Inc.*, *supra*. In view of the foregoing, the Board will disallow the reimbursement of Clifton Forge in the amount of $2,402.54.

5. On the other hand, we do not believe the Administrative Law Judge erred in allowing Clifton Forge Radio to be reimbursed for expenses incurred by it prior to May 27, 1971. There is no dispute that the expenses were incurred in connection with the preparation of the Clifton Forge Radio application now being dismissed. The Judge held that, "In the unique circumstances of this case, Clifton Forge [Radio] could reasonably have expected that the [WCFV] facilities would become available due to the financial inability of [the licensee of WCFV] to carry on." The Judge therefore concluded that it was "prudent" of Clifton Forge Radio to expend money on the preparation of its application. FCC 72M–1081, *supra* at paragraph 5. The "unique circumstances" the Judge was referring to were that James Reese owned Station WCFV from 1959 until 1965, when he sold it to Image Radio; that Reese remained primarily responsible on certain notes that were assumed by Image Radio; that Reese became aware that Image Radio had become delinquent in its payments, and that the holder of the notes intended to institute foreclosure proceedings on the station assets which secured them; and that Clifton Forge Radio actively sought to reacquire WCFV's assets and prosecute an application for the vacated facility. The lien on WCFV's property was foreclosed and the station went off the air on March 10, 1971, over two months before the Commission released its Decision denying Image Radio's renewal application.[8] The Board therefore agrees with the Judge that, *under the particular facts of this case*, the expenses incurred by Clifton Forge Radio before May 27, 1971, are reimbursable. Thus, we disagree with the Bureau that the expenses in question

[8] In its opposition, Clifton Forge Radio states that of the $585.65 spent by it prior to May 27, 1971, over $489.00 was spent after March 10, 1971.

were "speculative" and, therefore, non-reimbursable. To the contrary, the undisputed facts show that the expenses were prudent and legitimate.[9]

6. Accordingly, IT IS ORDERED, That the Broadcast Bureau's Partial Appeal of Adverse Ruling, filed September 5, 1972, IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and that the Memorandum Opinion and Order, FCC 72M–1081, released August 28, 1972, IS MODIFIED as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[9] In our view, there is no support for the Bureau's purely speculative assertion that, "Had the Commission renewed [WCFV's] license Image [Radio] would most certainly have gotten its financial house in order to resume operation or to assign the license to another." For one thing, the station ceased operation on March 10, 1971, after the lien was foreclosed. This event was foreseen by Clifton Forge Radio when it decided to file its instant application.

F.C.C. 72-1078

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re The Matter of Applications for Certificates of Compliance Field by CSRA CABLEVISION, INC., NORTH AUGUSTA, S.C., AIKEN COUNTY, S.C.	CAC-127 (SCO32) CAC-623 CAC-128 (SCO33) CAC-634

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. CSRA Cablevision, Inc., operates cable television systems in North Augusta and portions of Aiken County [1] and, pursuant to Section 76.11(a) and 76.13(b) of the Commission's Rules, seeks certification for carriage of the following television stations:

WRLK-TV (Educ., Channel 35), Columbia, South Carolina; WETV (Educ., Channel 30), Atlanta, Georgia; WGTV (Educ., Channel 8), Athens, Georgia; WTCG (Indep., Channel 17), Athens, Georgia; WOLO-TV (ABC, Channel 25), Columbia, South Carolina; WAGA-TV (CBS, Channel 5), Atlanta, Georgia; or WNOK-TV (CBS, Channel 19), Columbia, South Carolina.[2]

2. CSRA currently is carrying the following television signals on its cable systems:

WRDW-TV (CBS/NBC, Channel 12), Augusta, Georgia; WJBF (ABC/NBC, Channel 6), Augusta, Georgia; WIS-TV (NBC, Channel 10), Columbia, South Carolina; WCES (Educ., Channel 20), Wrens, Georgia; WEBA (Educ., Channel 14), Allendale, South Carolina.

3. Both North Augusta and the described unincorporated area of Aiken County are located within the specified zone of the Augusta, Georgia television market, a smaller market. A cable television system located in such a market is permitted to carry the signals of noncommercial educational stations operated by an agency of the State within

[1] The unincorporated area of Aiken County served by CSRA immediately surrounds the City of North Augusta. A description of that area of Aiken County to be certified is as follows:

"Beginning at a point at the intersection of U.S. Highway 1 with the Georgia/South Carolina line in the Savannah River and extending Northeasterly along Savannah River to the point where Pole Branch enters the Savannah River; proceeding Northeasterly along Pole Branch to Martintown Road (S.C. Highway 230); continuing in a straight line to the point of intersection of Interstate 20 and U.S. Highway 25; then Southeasterly to the intersection of Clearwater Road (S.C. 126) with Cherokee Road (S.C. Highway 366); continuing Southeasterly along Cherokee Road to Bradleyville Drive; then Southeasterly to the City Limits of North Augusta; continuing due South to U.S. Highway 1; then Westerly along Highway 1 to the point of beginning, excluding that portion of the above described area that lies within the corporate limits of the City of North Augusta, South Carolina."

[2] The original applications for certification (CAC-127 and CAC-128) included the television signal WHAE-TV (Independent, Channel 46), Atlanta, Georgia. Rust Craft Broadcasting Company, licensee of Station WRDW-TV (CBS/NBC, Channel 12), Augusta, Georgia, objected to carriage of WHAE-TV and, on June 23, 1972, CSRA withdrew its application for carriage of Station WHAE-TV. Accordingly, so much of CSRA's application as relates to carriage of WHAE-TV will be dismissed at the request of the applicant.

which the system is located, pursuant to Section 76.59(c) of the Rules. That section also permits such a cable system to carry any other noncommercial educational signals, absent objection raised by any local noncommercial educational station or State or local educational television authority. Carriage of Stations WRLK–TV, WETV, and WGTV is consistent with that provision of the Rules. In addition, such a cable system may carry the complement of three network and one independent stations, pursuant to Section 76.59(b)(2) of the Rules. CSRA justifies carriage of Station WTCG as being consistent with Section 76.59(b)(2). A cable system located in a smaller television market may carry the nearest full network stations or the nearest in-state full network stations pursuant to Section 76.59(b)(1) of the Rules. CSRA claims that carriage of Stations WOLO and either WAGA–TV or WNOK–TV is consistent with the above provision.

4. Because North Augusta and the described unincorporated area of Aiken County are located in a smaller television market, Section 76.251 of the Rules, requiring the provision of specified access channels, is not applicable to either system. In addition, because both systems were operative prior to March 31, 1972, Section 76.31(a)(4) exempts them from compliance with the franchise standards provisions of the Rules (Section 76.31) until March 31, 1977 or the expiration of the existing franchise, whichever occurs first.

5. Oppositions to these applications have been filed by Rust Craft Broadcasting Company, licensee of WRDW–TV, Augusta, Georgia, and raise two questions. First, Rust Craft argued that CSRA is already carrying full network stations of all three networks and cannot import any additional full network stations. Second, Rust Craft contended that carriage of the WAGA–TV signal is contrary to Section 76.59(1) of the Rules because WAGA–TV is neither the nearest full network station nor the nearest in-state full network station. Rust Craft stated that a waiver of the above provision is not justified because of the insufficiency of the public interest argument made by CSRA.

6. CSRA, in its applications, presented an analysis of prime time CBS network programming carried by Station WRDW–TV during the six week period between April 22, 1972 and June 2, 1972. The conclusion of the analysis was that Station WRDW–TV carried CBS network programming 83.8 percent of the possible prime time during that period, thus falling short of the 85 percent requirement set forth in Section 76.5(1) of the Rules to qualify a station as a full network station. If Station WRDW–TV is not considered a full network station by the Rules, CSRA would be justified in carrying a full CBS network station, in accordance with Section 76.59. Rust Craft contended that the 85 percent figure should be determined by a compilation of weekly prime time hours over a greater length of time. Accordingly, Rust Craft found that WRDW–TV carried 85 percent of CBS programming during three of the six weeks (50 percent) used in CSRA's study and during eight of the thirteen weeks (61.5 percent) between March 4, 1972 and June 2, 1972.

7. The definition of a full network station in Section 76.5(1) does not specify exact criteria. The test for determination of a full network station is whether the station "generally carries in weekly prime time hours 85 percent of the hours of programming" of a major network.

Such a requirement necessitates a reasonable showing of meeting the 85 percent weekly standard. In light of all of the information before us, we are unable to conclude that WRDW–TV does not meet our standards, and thus carriage of a distant CBS full network station is not consistent with our rules. No evidence was submitted regarding ABC network programming carried by Station WJBF. Rust Craft's assertion that WJBF is a "full network station" is not sufficient to convince the Commission to deny the carriage of a full ABC network station as requested by the applicant. In the absence of data to the contrary, it is reasonable to assume that WJBF is just what it appears to be—a partial network station. Accordingly, CSRA's request to carry the full network station, WOLO–TV, is consistent with our Rules.

Accordingly, IT IS ORDERED, That the captioned applications for Certificates of Compliance filed by CSRA Cablevision, Inc. ARE GRANTED to the extent reflected herein and are otherwise DISMISSED or DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN WAPLE, *Secretary.*

F.C.C. 72-980

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
THOMAS R. ASHER, COMMITTEE TO ELECT MCGOVERN-SHRIVER
Concerning Fairness Doctrine Re American Broadcasting Co. and National Broadcasting Co.

NOVEMBER 3, 1972.

Mr. THOMAS R. ASHER,
Media Access Project.
Committee to Elect McGovern-Shriver,
1910 N Street NW.,
Washington, D.C. 20036

DEAR Mr. ASHER: This refers to your fairness complaint dated November 2, 1972 and filed on behalf of the Committee to Elect McGovern-Shriver, against the American Broadcasting Company and the National Broadcasting Company.

You request that the Commission require ABC and NBC to provide free time to the McGovern-Shriver Committee to rebut "false and misleading statements contained in deceptive spot advertisements purchased by the Nixon-Agnew campaign and aired over the NBC and ABC networks" during the past month.

You state that the advertisement in question is a political spot advertisement paid for by Democrats for Nixon, which "grossly distorts the position of the Democratic Party's Presidential nominee . . . on one of the most important, fundamental, and controversial issues of the current campaign—welfare reform." You state that the spoken text of the advertisement and a description of its visual content are as set forth in Exhibit A attached to your complaint, which also is appended to this letter to you.

You also attach, as Exhibit B, the text of remarks delivered by Senator McGovern before the New York Society of Security Analysts on August 29, 1972, which you state sets forth Senator McGovern's true position on the welfare issue. You state that National Campaign Chairman Lawrence F. O'Brien has requested ABC and NBC to afford free time to the Committee to Elect McGovern-Shriver "to rebut the false and misleading charges contained in this spot advertisement" and that both networks have refused this request in answers attached to your complaint.

The ABC reply, dated October 27, 1972, states in pertinent part:

> In its so-called *Zapple* ruling the Commission squarely held that where supporters of one candidate purchase time to urge his election. It would be inappropriate to require a licensee to provide free time to supporters of an opposing candidate. Any such requirement would be an inappropriate intrusion into campaign

financing. Furthermore, in his appearance last Sunday on a special one hour Issues and Answers program and on paid political telecasts on the ABC network, Senator McGovern has had abundant opportunities to comment on his welfare proposals. In addition, his welfare proposals have been covered by ABC TV in news reports. Accordingly, your October 26 request for free time to rebut a spot announcement carried during the week of October 9 is respectfully declined.

NBC's reply to your request, also dated October 27, likewise cites the Commission's *Zapple* ruling (*In Re Request by Nicholas Zapple*, 23 FCC 2d 707 (1970)) as the basis for its rejection of your request, and further cites the Commission's *First Report* (*Handling of Political Broadcasts*) *In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, Docket No. 19260, 36 FCC 2d 40 (1972).

You request the Commission to rule that, "under the Fairness Doctrine, when a licensee broadcasts advertisements purchased by supporters of one candidate which affirmatively and maliciously distort the position of an opposing candidate, the licensee has an obligation to make appropriate time available to the maligned candidate and/or his supporters to rebut the charges." You assert that "inherent in the concept of fairness is the concept that one side of a political campaign not be permitted to use its vastly superior financial resources to malign and distort the position of the less well-endowed opponents."

You state that although under the *Zapple* ruling a licensee has no obligation to provide free response time when an organization's advertisements support one candidate or criticize the opposing candidate or his position on the issues, this ruling "does not deal with the situation where a political organization affirmatively and maliciously distorts the position of the opposing candidate."

You further state that in its *First Report* in Docket No. 19260, *supra*, "the Commission makes clear that the *Zapple* ruling was of necessity a limited response to hypothetical questions and that there could be 'no definitive answer absent the full facts concerning a particular case' "; that the Commission also stated that the *Zapple* ruling reflected "simply a common sense distillation of the public interest in certain political broadcast situations" and you assert that "Common sense and the public interest dictate that the Commission and the major television networks should not stand idly by when a major political party, with more funds at its disposal than any in the history of this nation, purchases expensive broadcast time to present a grossly false and distorted version of the position of the opposing candidate." You assert that in the *Zapple* ruling the Commission suggested that where a paid advertisement goes beyond "mere criticism" of a candidate or his position, an analogy might properly be drawn to the personal attack rules; that there is a proper analogy in this case, and that "Indeed, the Commission's personal attack rules specifically provide that the Fairness Doctrine 'may be applicable in the general area of political broadcasts' which include unwarranted attacks made by authorized spokesmen for qualified candidates or those associated with them in the campaign." (Citing 47 C.F.R. Section 73.123.)

We can find no basis in statute or Commission rule, policy or precedent for finding unreasonable the decision of the two networks to deny your request for free time in which to reply to a paid advertisement made on behalf of an opposing candidate.

The fairness doctrine, upon which you rely in your complaint, requires a licensee which presents one side of a controversial issue of public importance to afford reasonable opportunity for presentation of contrasting views on that issue. In most cases, the so-called *Cullman* doctrine is applicable. In *Cullman Broadcasting Co., Inc.*, 40 FCC 576, we stated at 577:

> In short, where a licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation.

However, the Commission made clear in the *Zapple* ruling, *supra*, that,

> While we continue our firm support for this general [Cullman] proposition, we believe it should not have applicability in the direct political arena. When spokesmen or supporters of Candidate A have purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen or supporters with free time. . . . Any such requirement would be an unwarranted and inappropriate intrusion of the fairness doctrine into the area of political campaign financing . . .

With respect to Mr. Zapple's second question—where supporters of Candidate A buy time in which to criticize Candidate B or his position on the issues of the campaign—we reached the same conclusion: that the licensee would not be obligated to provide free time to authorized spokesmen for Candidate B.

Although we stated in *Zapple* that the fairness doctrine was applicable to the situations cited, we added that "the critical question is the nature of its application" and then proceeded to set forth its application to the two situations encompassed in that ruling, as stated above. With respect to fairness generally, we stated at 708 that when a supporter of candidate A buys time, "barring unusual circumstances it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A."

With respect to your assertion that the Commission in this ruling suggested that where a paid advertisement goes beyond "mere criticism" of a candidate or his position, an analogy might properly be drawn to the personal attack rules, we stated specifically, with reference to criticism of a candidate, that,

> Here, of course, there is a closer analogy to the personal attack situation, although mere criticism would not constitute a personal attack within the meaning of our rule.

However, the Commission's personal attack rules which you cite specifically exempt from their application "personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in their campaign, on other such candidates, their authorized spokesmen or persons associated with the candidates in the campaign." Section 73.679(b)(2) Although the Note to this subsection of the rule states that the fairness doctrine "in a specific factual situation, may be applicable in the general area of politi-

cal broadcasts (b) (2), above," our citations of authority for this statement was Section 315(a) of the Communications Act of 1934, as amended, and our Public Notice on the *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* The relevant passage in Section 315(a) is, in effect, a statutory codification of the Commission's long-standing policy in the fairness area, and states that licensees have an obligation "to act in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

We can find no basis in either Section 315(a), our personal attack rules, our long-standing interpretation of the fairness doctrine generally, or the *Zapple* ruling, for granting your request. As to personal attacks, we find nothing in the announcement forwarded by the complainant to justify a conclusion that a personal attack was made on Senator McGovern, i.e., an attack "upon the honesty, character, integrity or like personal qualities of an identified person * * *" (Section 73.679 (a)). Even assuming, *arguendo*, that a personal attack had been made, our rules specifically exempt from the application of the rules attacks made by spokesmen for candidates upon other candidates.

Although the complaint has sought to apply the *Zapple* doctrine to this case by extracting certain phrases out of context, the clear import and purpose of that ruling was to delete the *Cullman* free-time obligation from situations of precisely this kind.

Finally, you state that the Commission should require the networks to provide free time to you because the announcement in question was false and misleading and "affirmatively and maliciously distort[ed] the position of an opposing candidate."

With respect to allegations of false and misleading statements by political candidates or their supporters, the Commission believes that the public interest will best be served through "robust, wide-open" debate (*New York Times* v. *Sullivan*, 376 U.S. 254, 270). Although the fairness doctrine generally is applicable to political campaigns, you have made no assertion, nor provided any evidence, that either network has failed in its overall programming to afford reasonable opportunity for discussion of the contrasting views of the Presidential candidates on issues in this campaign, including the issue of public welfare; and as stated above, the *Cullman* doctrine would not be applicable to the announcement here cited, even had you offered the evidence required by *Cullman*, that the licensee "has not presented (or does not plan to present) contrasting viewpoints in other programming."

With further reference to your allegation that the announcement was false and misleading, the Commission believes that it, the government licensing agency, should not attempt to judge the truth or falsity of material broadcast regarding candidates or ballot issues. To do so would require us to make innumerable judgments as to the merits or faults of statements made during the course of political campaigns and result in our becoming a national arbiter of the "truth"—a role most inappropriate to the federal licensing agency, even if it were not held to violate the First Amendment and Section 326 of the Communications Act.

A contrary ruling here would undermine the *Zapple* ruling and the Congressional scheme of equal opportunities in the political arena, for

it would mean that every time a supporter presented a paid political program, all of the opposition parties could immediately claim that the material was "false and misleading"—a matter which we could not and would not adjudicate—and would then be given free time on that basis. For example, if a group presented a paid broadcast on behalf of Senator McGovern, the "Democrats for Nixon" or the Committee for the Re-election of the President could claim that the broadcast contained false material and obtain free time. We submit that this manner of proceeding ignores the common sense of the political situation, which is that both sides are given "equal opportunities" for time to go after one another in robust, wide-open fashion, with no FCC rules granting free time to one party against paid time to another because the latter has somehow violated an amorphous standard of "truth" in political advertising.

For the above reasons, we cannot find that the judgment of ABC and NBC has been unreasonable. Accordingly, your request IS DENIED.

Commissioner Johnson concurring in the result; Commissioner H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

Audio

Senator George McGovernor recently submitted a welfare bill to the Congress. According to an analysis by the Senate Finance Committee, the McGovern Bill would make 47% of the people in the United States eligible for welfare. 47%. Almost every other person in the Country would be on welfare. The Finance Committee estimated the cost of this incredible proposal at 64 billion dollars the first year. That's six times what we're spending now. And who's going to pay for this? Well, if you're not the one out of two people on welfare, you do.

Visual

Begins with a shot of girders of a building under construction—camera pans to a workman in his early 40's, slowly closes in on him. Then a shot (from approximately where the worker is sitting) to an urban street below and a scene of people walking and a bus. Then a shot back to the worker—then brings in a close-up of him, right to his face. Finally a still frame of his face at the end along with the last line of the above audio. Final scene is a picture of Nixon with the print of "Paid for by Democrats for Nixon."

F.C.C. 72-983

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
CALIFORNIA COASTAL ALLIANCE (PROPOSITION 20)
Concerning Commission Ruling Re Fairness Doctrine

NOVEMBER 3, 1972.

CALIFORNIA COASTAL ALLIANCE,
C/O JAMES E. FOUSEKIS AND JOHN CURRAN LADD,
Law Office of Steinhart, Goldberg, Feigenbaum and Ladar,
1 Post Street,
San Francisco, Calif.

Commission has received from "citizens against the coastal initiative" a copy of a telegram signed "California Coastal Alliance" which is stated to have been sent to all California television stations. Text of telegram as forwarded to commission follows:

GENERAL MANAGER
KJEO-Fresno

FCC today directed its staff to inform KTVU and KRON that they are in violation of the Fairness Doctrine by reason of paid spot advertising by opponents of Proposition 20. Particular impact of repetitive one-sided spots in three weeks prior to election was basis. KRON had scheduled 29 such spots. Neutral coverage and offers of paid spots insufficient to comply. We have available 30 and 60 second spots supporting the proposition. Request that you immediately respond to our attorneys, Lewis Reid, Jim Fousekis or John Ladd 415-932-0116, unless you already running our spots one for one with opponents. We will bring further complaints against non-complying stations.

CALIFORNIA COASTAL ALLIANCE.

The above text of telegram, if accurate, appears to represent a misrepresentation of the Commission's ruling on your complaint against stations KTVU and KRON. Commission staff member Arthur Ginsburg told Mr. Ladd of your firm that after considering all of the circumstances, including the number of presentations of anti-proposition views, the Commission had ruled that KTVU and KRON had not complied with the requirements of the Fairness Doctrine with respect to proposition and that some further opportunity for contrasting viewpoints would be required. The Commission did not specify the manner in which additional opportunity need be afforded, leaving this to the discretion of the licensees in accordance with its long-standing policy.

The Commission's ruling was specifically restricted to stations KTVU and KRON, and even with respect to them, the ruling did not call for—quote—"One for one" unquote—presentation of contrasting views. The Fairness Doctrine does not require equality of number of presentations of contrasting views nor does it require equality of total time devoted to contrasting views. Therefore, it appears that the tele-

gram forwarded to us represents a misstatement of the Commission's ruling regarding KTVU and KRON and of the requirements of the Fairness Doctrine. You also are reminded that before the Commission will consider a Fairness Doctrine complaint, the complainant must identify the station, state the controversial issue involved and the complainant's reasons for believing that the station is not in compliance. Moreover, the Commission will not act upon such complaints until the stations named have been afforded a reasonable opportunity to respond.

Commissioner H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-982

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
EUGENE T. GUALCO, BOARD OF SUPERVISORS
COUNTY OF SACRAMENTO, CALIF.
Concerning Alleged Fraudulent Advertising

NOVEMBER 3, 1972.

EUGENE T. GUALCO,
Supervisor Board of Supervisors County of Sacramento,
827 Seventh Street,
Sacramento, Calif. 95814

DEAR MR. GUALCO: This is in response to your letter of October 27, 1972, regarding what you believe to be fraudulent advertising regarding certain propositions on the California ballot. You ask that the Commission investigate "deliberately false and misleading campaign advertising in opposition to Proposition 20. * * *"

With respect to allegations of false and misleading statements regarding controversial issues of public importance, whether in paid time or otherwise, the Commission believes that the public will ultimately be best informed on public issues through "robust, wide-open" debate, see *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 270, in which reasonable opportunity is afforded contrasting views. Absent certain conditions not here present (e.g., appearance by political candidates) each licensee may exercise its own judgment as how best to serve the public interest by presenting contrasting views, and what particular material is to be presented. Intervention by the Commission regarding specific material being broadcast for or against a proposition, even to the limited degree you urge, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a currently controversial issue—a position which would be inappropriate for the government licensing agency.

Commissioner H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-979

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
PENNY MANES, CINCINNATI, OHIO
Concerning Fairness Doctrine Re Station
WCPO-TV

NOVEMBER 1, 1972.

Air Mail—Special Delivery

Ms. PENNY MANES,
498 Kulla Viken Lane,
Cincinnati, Ohio 45204

DEAR Ms. MANES: This is in response to your fairness doctrine complaint of October 3, 1972 against WCPO-TV in Cincinnati, Ohio.

In your complaint you state that you are the Democratic Party nominee for Congress in the 2nd Congressional District of Ohio and that your opponent in this race is the Honorable Donald D. Clancy, the incumbent Congressman. You allege that there has been an "almost total lack of coverage" of your campaign for Congress by WCPO-TV; that while your opponent is covered whenever he makes a statement, you are not so covered; that any contest for a Congressional seat is a controversial issue of public importance; that the public has not been adequately informed of your campaign, qualifications, or your specific position on the issues in the campaign; that because of lack of coverage the licensee has failed to present both sides of a controversial issue of public importance and has failed to perform its public service obligations; and that you request a review of the "editorial, news, and editing practices" of the licensee.

In support of your contention, you list the following occasions on which the licensee failed to cover your campaign:

January 31, 1972	Licensee covers announcement of your candidacy but not your press conference.
May 22, 1972	Licensee fails to cover press conference concerning FHA-235 Program.
July 7, 1972	Licensee interviews Rabbi Sally Priesand but not you, and fails to cover endorsement of your campaign by Rabbi Sally Priesand; newsman and a photographer state that they have been instructed not to interview you; Assistant News Editor states that "'Penny Manes was not news."
July 9, 10, 13, 1972	Licensee fails to cover your participation in the Democratic National Convention, but covers your opponent at Republican Convention.
August 4, 1972	Licensee fails to interview you at "lettuce inspection."
August 9, 1972	Licensee refuses to broadcast your statements concerning HUD funding cutback.

August 22, 1972	Licensee refuses to cover your testimony before an Ohio Consumer Protection Agency hearing.
August 24, 1972	No coverage by licensee of your speech before a noon rally at Fountain Square.
September 8, 1972	Licensee refuses to cover your press conference concerning education, although two other Cincinnati stations covered the event.
September 13, 1972	Licensee refuses to broadcast your statement on the slaying of Israeli athletes.
September 21, 1972	Licensee refuses to cover your press conference concerning misconduct of FHA; press conference was covered by other TV stations.

Licensee's Response

The licensee denies Ms. Manes' complaint that there has been "an almost total lack of coverage" of her campaign and her complaint that Congressman Clancy is covered whenever he makes a statement. The licensee states that it is necessarily limited in the amount of time that can be devoted to any particular race because there are several Congressional races within its viewing area; that, consistent with its judgment of what is newsworthy, both candidates have been given coverage in its regularly scheduled news programs; that there has been no "use" of broadcast facilities by either candidate within the meaning of Section 315 of the Communications Act, as amended; that Ms. Manes was invited to appear with her opponent on a half-hour public affairs program entitled "Impact" fully one week before she filed her complaint with the Commission and did in fact appear on the program; and that the licensee's invitation to Ms. Manes to appear on "Impact" is tangible evidence of its good faith intentions and its compliance with its public service responsibilities.

In regard to the complainant's specific allegations, the licensee states that it carried a news story on January 25, 1972 on the Hamilton County Democratic Nominating Committee's selection of Ms. Manes as its Congressional candidate, and reported the announcement of her candidacy on January 26. The licensee stated that it did not interview her because she had not yet resigned her position with the federal government and that it did not interview Congressman Clancy when he was endorsed for re-election. As to the press conference called by Ms. Manes on January 26 to formally announce her candidacy, licensee states it did not cover it because it felt the story was "anti-climatic from a news standpoint" and that it would not have been a bona fide news interview under Section 315(a) of the Communications Act since the event was staged by the candidate.

In regard to the allegation of Ms. Manes that the licensee instructed its staff not to interview her, the licensee states that the cameraman and a newsman involved in the incidents, although no longer employed by the station, denied having told Ms. Manes that they were instructed not to interview her and denied that they were instructed not to interview Ms. Manes. The licensee also denies that the Assistant News Editor ever said that Ms. Manes was not "news."

In regard to WCPO's decision to interview Rabbi Sally Priesand but not Ms. Manes and its decision not to carry her endorsement of Ms. Manes the licensee states that the reason it interviewed Rabbi

109-019—72——7

Sally Priesand was that since she was the only female rabbi in the country and was leaving Cincinnati for a position in New York, coverage of her was a newsworthy event. The licensee states it interviewed Rabbi Priesand in response to a telephone invitation made by a woman who did not identify herself as being connected with any political campaign and that had the licensee known the real purpose of the invitation it would not have accepted the invitation. According to the licensee, Ms. Manes was not interviewed because the interview with her would not have been a bona fide news interview, since it would have been "staged" by Ms. Manes.

In regard to WCPO's failure to cover Ms. Manes' activities at the Democratic National Convention (although it covered the activities of Congressman Clancy at the Republican National Convention), the licensee states that Ms. Manes was not a delegate to the Democratic Convention whereas Congressman Clancy was a delegate to the Republican Convention; that he was a member of the Republican Party Platform Committee, and also the leader of a faction in the Ohio Delegation which supported the "Small State" position on delegate selection.

With reference to the "lettuce inspection," the licensee states that the story being covered concerned the efforts of the United Farm Workers to win support for a boycott of lettuce harvested by non-union labor; that Ms. Manes was one of several people photographed inspecting lettuce; and that these photographs, including Ms. Manes' picture, were telecast on the news.

The licensee states that Ms. Manes' letter to the Commission contradicts her charge that the licensee has favored Congressman Clancy over her; that in her letter Ms. Manes points out that her skyjacking statements were carried by the licensee in response to views expressed by Congressman Clancy; that Ms. Manes in her complaint does not specify any other positions on issues taken by Congressman Clancy and aired by the licensee on which she has not been given an opportunity to express her position; and that the invitation to Ms. Manes to appear on the program "Impact" clearly refutes any suggestion that Congressman Clancy has been favored over Ms. Manes.

The licensee states that Ms. Manes has not demonstrated by extrinsic evidence that WCPO has engaged in distortion or suppression of any news pertaining to her; and that Ms. Manes' request for a Commission review of the "editorial, news, and editing practices of Channel 9" should be rejected because the Commission's policy is not to substitute its judgment for that of the licensee in regard to the newsworthiness of particular events. The licensee further points out that by Ms. Manes' admission she has not discussed her complaint with the station and that this is clearly contrary to the Commission requirement that those who have a fairness doctrine complaint first discuss it with the licensee before making a complaint to the Commission.

Complainant's Response

In response to the licensee's letter, you reaffirm your allegation that the licensee has not fulfilled its fairness doctrine obligations because of its failure adequately to inform the public of both sides of the

controversial issue of the Second District Congressional race for Congress.

You also state that while you have submitted over 35 press releases to WCPO–TV only one of these, dealing with the filing of your fairness doctrine complaints, has been telecast. You state that the licensee has not fulfilled its obligation to inform the public of your candidacy because of its failure to take a statement from you at the "lettuce inspection" and its failure to cover you at the Democratic National Convention. You further state that WCPO's decision to interview Rabbi Sally Priesand rather than you constituted news distortion.

In addition you state that it is ironic that in regard to your attendance at a luncheon for women candidates and at a meeting of the National Women's Political Caucus at the Democratic National Convention, other news media covered these events while your own local station, WCPO, did not. In regard to your participation of the program "Impact" you state that the 14 minute exposure which you received on this program does not indicate the licensee has complied with the fairness doctrine.

Further Statement by Licensee

In response to a Commission request for further information regarding, and certain documentation of, its response, licensee states that within its Cincinnati Metropolitan Area there are congressional races in four districts in Ohio, one in Indiana and one in Kentucky. Its Kentucky coverage area also includes contest for United States Senate and its Indiana coverage area includes races for Governor and all state offices. Furthermore, the licensee states that the City of Cincinnati is within Hamilton County, which has on the ballot 27 important contests involving the election of judges, county officials and also many local ballot issues, including one concerning increases in the city earnings tax and a major school board issue. In the WCPO Area Dominant Influence (ADI) there are two additional Kentucky Congressional races and on the Ohio ballot there are races for three state supreme court vacancies and also a proposal for the repeal of the state income tax. In summary, the licensee states there are 200 important ballot contests for public office in its ADI and approximately 150 ballot contests in its metro area.

The licensee also has submitted a statement from its Assistant News Editor, Denis G. Gulino, in which he states that the licensee's coverage of the congressional campaign in question has been based solely on its news judgment and denies stating that Penny Manes was not "news." Also included was a letter from Mack Hunley, former photographer with WCPO–TV, in which he states that his assignment was to photograph Rabbi Priesand and a letter from James F. Green, who interviewed Rabbi Priesand, in which he stated that his intention was to keep the interview with Rabbi Priesand on a personal level and not to include politics.

The licensee further states that Ms. Manes and her opponent, as well as the Congressional candidates in the other Congressional district in Hamilton County, will each be presented in "vignettes" of approximately two minutes each before the election. These "vignettes" will con-

sist of film clips plus narration, and be included in regularly scheduled newscasts.[1]

DISCUSSION

The fairness doctrine requires a licensee which presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting points of view. In a fairness doctrine complaint the complainant must demonstrate that the licensee has failed in its overall programming to comply with the fairness doctrine. The Commission will review a licensee's actions in this area only to determine whether such actions were reasonable and in good faith.

In your complaint you allege that a Congressional race is by definition a controversial issue of public importance and that the licensee has failed to provide contrasting views on this issue and has favored your opponent over you. However, other than the coverage of your opponent at the Republican National Convention you do not demonstrate how your opponent has been covered while you were not covered.

The licensee's decision to cover some of Congressman Clancy's activities at the Convention allegedly was based on its news judgment that the activities of a delegate and the question of the method of delegate selection were of special news interest to its viewers. It appears that this decision and the decision by the licensee to carry only selected press releases by candidates for public office were within the boundaries of reasonable discretion afforded a licensee in its news judgment, particularly in light of the fact that there are many Congressional contests as well as other contests on state, local, and federal levels in its coverage area. In regard to your skyjacking statements the licensee alleges that these statements were broadcast in response to your opponent's statements in this area. Concerning your allegation (which was denied by the licensee) that the licensee instructed its news personnel not to cover you because you were not "news", we note that in any event the determination of what constitutes "news" is a judgment to be made by the licensee and not by the Commission.

We note that you and your opponent have appeared on the half-hour WCPO–TV program, "Impact"; that the licensee asserts that it has presented at least as much news coverage of your campaign as that of your opponent; that the licensee states that there are hundreds of important ballot contests within its coverage area requiring news coverage and points out that under the Commission's policies it is within the editorial judgment of the licensee to determine which news items shall be broadcast and how much of each; and that you have not alleged that the licensee has refused to sell time to you or has given time to your opponent which entitles you to equal free time under Section 315(a) of the Communications Act of 1934, as amended. With respect to conflicting statements made by you and present and former employees of the licensee as to whether they were instructed not to give you news coverage, as we stated in *Hunger in America*, 20 FCC 2d 143, 147

[1] Licensee also states that in addition to previously recited coverage of Ms. Manes, it broadcast news stories showing her appearance before the city council on October 18 at 6 and 11 p.m., and that its only news story concerning her opponent was a summary of a derogatory statement by Ralph Nader about the opponent.

(1969), "In these circumstances, it is, we believe, inappropriate to hold an evidentiary hearing and upon that basis (i.e., credibility or demeanor judgments) make findings as to the 'truth' of the situation."

In view of the foregoing, the Commission is unable to find that the licensee has acted unreasonably or in bad faith with respect to its fairness doctrine obligations. Accordingly, no further action by the Commission is warranted.

Commissioners H. Rex Lee and Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-981

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HON. RONALD REAGAN, GOVERNOR OF CALIFORNIA
Concerning Alleged Deceptive Advertising Re California State Employees Association

NOVEMBER 3, 1972.

Air mail
Hon. RONALD REAGAN,
Governor of California,
State Capitol,
Sacramento, Calif. 95814

DEAR GOVERNOR REAGAN: This is in response to your letter of October 27, 1972 enclosing a letter you wrote to the Chairman of the Federal Trade Commission charging the California State Employees' Association with false and deceptive advertising in support of Proposition 15 on the California ballot.

You have asked this Commission to remind its California licensees that they have a legal obligation to screen out all broadcast materials which are false and fraudulent and to remind them of their obligation under the fairness doctrine. You state that Proposition 15 is unquestionably a controversial issue of public importance under the fairness doctrine.

As you know, the fairness doctrine requires a licensee which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting points of view. The Commission has made known its policy in this area in many rulings, up to and including the present political campaign, and it believes that its licensees are fully aware of their responsibilities.

With respect to allegations of false and misleading statements regarding controversial issues of public importance, whether in paid time or otherwise, the Commission believes that the public will ultimately be best informed on public issues through "robust, wide-open" debate, see *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 270, in which reasonable opportunity is afforded contrasting views. Absent certain conditions not here present (e.g., appearance by political candidates) each licensee may exercise its own judgment as how best to serve the public interest by presenting contrasting views, and what particular material is to be presented. Intervention by the Commission regarding specific material being broadcast for or against a proposition, even to the limited degree you urge, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth

or falsity of material being broadcast on either side of a currently controversial issue—a position which would be inappropriate for the government licensing agency.

Commissioner H. Rex Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-984

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DR. BENJAMIN SPOCK PEOPLES PARTY
Concerning Fairness Doctrine Re: ABC,
NBC, and CBS Networks

NOVEMBER 6, 1972.

PEOPLES' PARTY,
c/o SAMUEL J. BUFFONE, Esq.,
Stern Community Law Firm,
2005 L Street NW.,
Washington, D.C. 20036

GENTLEMEN: This is in reply to the fairness doctrine complaint filed on behalf of Dr. Benjamin Spock, candidate of the Peoples' Party for the office of President of the United States, against the ABC, NBC and CBS television networks for their alleged failure to broadcast adequate coverage of the controversial issues of public importance raised by his candidacy. You request that the Commission require ABC, NBC and CBS to provide at least one-half hour of time on Monday evening, November 6, 1972, for the presentation of the Peoples' Party's views on the issues involved in the current Presidential campaign, and that the Commission direct that, "Dr. Spock personally be permitted to express his views on these controversial issues due to the unique nature of the fairness doctrine consideration presented herein."

You state that the Peoples' Party is a national political party with candidates for local, state and national offices; that its candidates for President and Vice President (Julius Hobson) are on the ballots of ten states; that it adjudges its strength to be between five and ten per cent of the nation's electorate; that Dr. Spoke and Mr. Hobson were formally nominated at the Peoples' Party Convention in St. Louis, Missouri, on July 29, 1972, and have been waging an extensive national campaign since that date; that there has been almost total lack of network broadcast coverage; that both CBS and NBC carried one to two-minute segments discussing the party's convention on July 29; that as the result of an equal time complaint pursuant to Section 315 of the Communications Act, NBC carried a brief interview with Dr. Spock on its early morning "Today Show"; that on October 8, 1972, ABC presented Dr. Spock and three minor party presidential candidates on its "Issues and Answers" program; that on October 15, 1972, CBS carried a seven-minute segment of its morning news on the Spock campaign; and that on October 30, 1972, ABC carried a two and one-half minute segment on its evening news program.

You assert that NBC and ABC repeatedly promised additional coverage, yet refused specific requests and equivocated on the exact nature of time of the promised coverage.

You state that Dr. Spock's candidacy presents a controversial issue of public importance; that by extensively covering the campaigns of President Nixon and Senator McGovern, "the networks have given disproportionate coverage to one side of this controversial issue"; that Dr. Spock's candidacy raises numerous other controversial issues of public importance such as the war in Vietnam, military spending, abortion, and guaranteed income, and that these issues take on a unique character when associated with candidates for that office. You contend that "when only one side of these controversial issues is carried during news programming exempted from equal time treatment by Section 315, the licensee is nevertheless not relieved of its fairness doctrine obligation to cover these issues fairly."

In their responses, the networks state in essence that the complaint sets forth no valid grounds for its request; that the Commission's requirements for fairness doctrine complaints have not been met; that Dr. Spock's complaint is against their news coverage of him and the Peoples' Party; that exercise of news judgment in coverage of political campaigns, like that with respect to other news events, falls within the discretion of a licensee and must prevail unless unreasonable or in bad faith; that the 1959 Amendments to Section 315 recognized journalistic news judgment (CBS); that there are at least 12 "self-professed candidates for President" and that "the inhibitions which granting the complaint would have on broadcaster coverage of campaigns with as many possible candidates would clearly violate the Congressional interest in establishing the Section 315 exemption" (NBC); and that fairness "does not require that equal or comparable amounts of time be given to fringe parties" (ABC). ABC cites the Broadcast Bureau's *Letter to the Libertarian Party*, —— FCC 2d —— (October 31, 1972), and ABC and NBC cite the Commission's *First Report, Handling of Political Broadcast; The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 36 F.C.C. 2d 40 (1972).

Discussion

At the outset, we note that you have characterized this as a "fairness" rather than an "equal opportunities" complaint. However, you ask specifically that the Commission order that Dr. Spock be permitted by the networks to appear personally on the November 6, 1972 program requested by you. The Commission has power to order a candidate on a non-exempt program only if a licensee has failed to afford equal opportunities under Section 315. Since you are not complaining of, nor has any showing been made, of a Section 315 equal opportunities violation by any network, there is no basis for the Commission's granting your request. We now address ourselves to the fairness aspect of your complaint.

The controversial issue of public importance involved here is who should be elected President of the United States. Under established fairness doctrine procedures (see *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 F.R. 145 (1964)), a complainant must first make his complaint to a licensee or network and, if not satisfied, furnish the Commission

with reasonable grounds for his contention that the licensee or network has failed in its overall programming to afford reasonable opportunity for the presentation of contrasting views on a specific controversial issue of public importance. We note initially that the Peoples' Party did not make its complaint first to the networks. Moreover, the complaint was not filed with the Commission until the close of business on Thursday, November 2, and the networks did not received their copies until November 3, although the complaint is based on the networks' conduct throughout the campaign.

We do not have sufficient facts here to make a ruling that there has been a violation of the fairness doctrine. Thus, the only information before the Commission is that the Peoples' Party candidates for President and Vice-President are currently on the ballots of 10 states and that the Peoples' Party has "been conducting an extensive national campaign" since July 29, 1972. You state that the Party has lawsuits pending to obtain full ballot status in three of the states and that "write-in campaigns for local and national candidates are active in all unballoted states except Alaska and Wyoming." You furnished no further information with respect to the nature and extent of Dr. Spock's campaign. Thus, you have set forth no reasonable grounds for concluding that the substantiality of Dr. Spock's campaign is such as to render unreasonable the networks' judgment that in their overall programming they have adequately covered the campaign under the fairness doctrine. See *Allen C. Phelps*, 21 FCC 2d (1969), generally with respect to the type of showing a complainant should make to warrant a finding that fairness has not been complied with. In this case, you have presented us with no facts to show that there has been any violation of the fairness doctrine.

In view of the foregoing, no Commission action is warranted at this time and your complaint IS DENIED.

Commissioner Hooks absent; Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Dr. Benjamin Spock is the Peoples' Party candidate for President of the United States.

You wouldn't know it from watching CBS and NBC. Both networks have devoted zero minutes and zero seconds of coverage to his campaign from October 16 through November 5—the crucial last three weeks before election November 7, 1972.

The majority finds this complies with the networks' obligations under the Fairness Doctrine.

I dissent.

This is not as easy a case as either the majority's characterization of it—or mine—would tend to indicate.

It is snarled in legal, procedural and factual disputes. There is something to be said for almost everyone's point of view on almost every issue.

Nonetheless, on balance, I believe the Commission is in error, and that the Fairness Doctrine does impose an obligation on CBS and NBC to make more time available to the Peoples' Party.

I. EQUAL TIME

It is important to note, at the outset, that this is *not* one of the so-called "equal time" cases.

Section 315 of the Communications Act provides that if a broadcaster permits a "use" of his station by a candidate he has an obligation to "afford equal opportunities to all other such candidates for that office." If the time was made available free, he must make free time available to all. If it was sold, he cannot refuse to sell time to others.

Neither the Peoples' Party nor the FCC treat this complaint as an "equal time" complaint. I must, therefore, presume that no free time was given by the networks to Richard Nixon or George McGovern, and that Dr. Spock's failure to purchase time to match theirs was a personal choice or (more likely) a lack of funds, rather than a refusal to sell time by the networks.

Section 315 specifically excludes from the "equal time" doctrine, however, a number of categories of candidate coverage. These include:

"(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary * * *, or
(4) on-the-spot coverage of bona fide news events. * * *"

It is these categories which give rise to the controversy before us.

II. THE FAIRNESS DOCTRINE

In addition to the "equal time" requirements, broadcasters also have an obligation to comply with the "fairness doctrine."

Immediately following the list of exemptions to the "equal time" doctrine, Section 315 goes on to say:

> **Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation or newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.**

This sentence is the basis for what has come to be called the "fairness doctrine."

The fairness doctrine requires two things of a broadcaster: (1) that he cover "issues of public importance," and (2) that he do so fairly, that he present "conflicting views," that he not use his station to censor, or propagandize for one point of view or another. This is not, it should be noted, a requirement that "equal time" be devoted to all views, nor is it a requirement that any given individual need be put on the station.

III. CANDIDATES AND FAIRNESS

Thus, at the threshold, we are confronted with the question of whether the fairness doctrine covers candidates at all. In its letter of

November 6, 1972, for example, NBC states unequivocally, "NBC does not believe the fairness doctrine applies to candidates." The argument for this point of view would be that the equal time doctrine is the only law intended to cover candidates, that fairness only covers other kinds of issues, and that so long as a broadcaster has complied with the equal time doctrine he has no further obligation to candidates.

The law is very clear as I read it. The fairness doctrine *does* cover the election coverage of candidates. Accordingly, I think it would be extremely unfortunate if any ambiguity were left on this score.

The language of Section 315 really needs no interpretation, or legislative history. It is crystal clear. After stating the exemptions to the equal time requirements, Congress very expressly stated that, "Nothing * * * shall be construed as relieving broacasters * * * from the obligation * * * to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" [i.e., the fairness doctrine]. And that is precisely what NBC *is* trying to do: to construe the equal time doctrine as relieving it from its obligations under the fairness doctrine.

As I say, the Act really stands on its own language. However, it may be viewed as somewhat reinforcing to know that the Commission has always reassured Congress that it would, indeed, interpret the language as Congress wrote it.

Thus, on March 2, 1971, Chairman Dean Burch, in testifying before the Senate Commerce Committee on S. 382, presented alternative draft legislation and analysis to deal with what he called "fringe candidates." The proposal would, in brief, have limited equal time to those candidates receiving more than 2 percent of the vote, or 1 percent signatures on petitions. He was very careful on that occasion to assure Congress, however, that "candidates who do not meet any of the above criteria" would not be excluded from the airwaves; "licensees would still be bound by the requirements of the 'Fairness Doctrine,' * * *."

To my knowledge, it has never been seriously suggested—prior to this case—that the fairness doctrine was inapplicable to candidates in a Presidential election.

IV. WHAT IS A "CANDIDATE"?

The Commisison majority says it is inhibited in ruling on this case because it does not have enough information to judge, among other things, whether or not Dr. Spock is a candidate.

The following is uncontroverted in this proceeding:

(1) The Peoples' Party held a national nominating convention in St. Louis, Missouri, on July 29, 1971;

(2) The Peoples' Party nominated Presidential (Dr. Benjamin Spock) and Vice Presidential (Julius Hobson) candidates on that occasion; and

(3) The Peoples' Party Presidential and Vice Presidential candidates are on the ballot in ten states, and are conducting write-in campaigns in some other states.

We have the Party's allegation that their candidates have been waging an extensive national campaign. We do not have a detailed

itinerary of the candidates, but we might take judicial notice of the fact that it would not have to be *very* extensive to exceed that of the Republican Party candidate this year.

Given these facts, it seems to me preposterous to hold any serious doubts about whether or not Dr. Spock is, in fact, a "candidate" for the Presidency—unless one looks only to the probability of election as a criterion. And *that* standard would raise some question about the Republican candidate in 1964—and the Democratic candidate this year.

V. HOW MUCH IS "FAIRNESS"?

Once we acknowledge that the law requires the broadcaster to give *some* time to Dr. Spock under the fairness doctrine, the questions then arise as to how much and when.

My own view is that the three weeks prior to an election is a crucially important time for any candidate, and that any common sense approach to either equal time or fairness in politics would have to acknowledge that fact.

For example, I do not believe the fact that ABC, CBS and NBC covered Dr. Spock's acceptance speech on July 29, 1972, is evidence that he has been fairly treated in October—although it may be some evidence that his candidacy *was* taken seriously by the networks at that time.

ABC is the only network to give any attention to Dr. Spock's candidacy during the last three weeks of the campaign—two and one-half minutes in the October 30, 1972, evening news show. In addition to the convention coverage, ABC also presented Dr. Spock for 12–15 minutes on a special Issues and Answers program on Sunday, October 8.

CBS presented an interview with Dr. Spock for about seven minutes on October 13, 1972, in addition to its July coverage.

NBC offered Dr. Spock time on a program about minority candidates on August 27, 1972 which he was unable to accept. Following an equal time complaint, it reluctantly presented a brief interview with Dr. Spock on the Today Show on September 13. It also covered the convention in July. It has, apparently, presented *nothing* regarding Dr. Spock's candidacy since September.

Whatever may be said of CBS and NBC's coverage during August, September, and the first two weeks of October—one seven-minute appearance on CBS and one "brief" interview on NBC—it seems clear to me, that their coverage during the last three weeks of the campaign—zero appearances and zero minutes—does not comply with their obligations under the fairness doctrine.

VI. PROCEDURAL PROBLEMS

The Peoples' Party complaint was filed Thursday, November 2, 1972. It was apparently mailed—special delivery—rather than hand delivered to the networks. CBS—which has many lawyers—received the letter at the "wrong" law firm for matters of this kind.

Notwithstanding these problems, however, the FCC met on the matter on Friday, November 3, and the networks were at least notified of the complaint—and asked to respond—on that date.

Normally, a complainant should first present his fairness grievances to the broadcast stations (or networks) involved, and present the Commission with their answers as well as the complainant's allegations. However, it could be said that the People's Party *did* carry on a running complaint with the networks—which seemed, to the Party, to be always on the verge of promising coverage—until this past week.

Had the networks been able to conduct a more thorough and leisurely search of their records, they might have been able to find they had provided more coverage of Dr. Spock.

These procedural problems are unfortunate. They are not, however, all that unusual in the onrush of last-minute election issues that come to the Commission—most of which are presented, and resolved, orally, with no documentation whatsoever. Nor are they, in my judgment, decisive.

VII. RELIEF

Whenever a government agency is involved in broadcast issues involving a Presidential election, with remedies involving news content, on the afternoon before an election, it is perhaps too much to hope that light will overcome heat.

It is very easy to misrepresent the positions of any of the parties or Commissioners involved in this case—including my own.

I have consistently taken the position that the government in general, and the FCC in particular, should not meddle in the news judgment of broadcasters—subpoenaing newsmen's notes and film, criticizing newsmen's "bias," complaining about "commentaries" after Presidential addresses, and so forth.

I do not want the right to tell Walter Cronkite that he has to present Dr. Spock—or anyone else—as "news." News judgment is just that, news *judgment*—and the FCC (as the Commission has often unanimously declared) is not the national arbiter of "truth."

But the Congress has clearly required the FCC to apply the fairness doctrine to minority parties, and the Commission has often reassured Congress it would do so. All our fairness decisions *may* result in a broadcaster righting an imbalance through additional news items; none requires that format. And so it is with this decision: the networks might choose to treat Dr. Spock as "news" this evening; they need not do so should they choose another program format.

Had this case been presented a week or two ago it would have been easier to debate, analyze, and resolve. But that can be said every two years of the election-eve equal time and fairness complaints. I would have preferred to give CBS and NBC more time than a few hours to figure out a way to present Dr. Spock to their viewers in a format that is exempt from the equal time requirements and most conveniently suits the programming schedules and news judgments of the networks. I would not, however, fail to decide the case on those grounds.

Accordingly, I would treat this as any other fairness decision; find that CBS and NBC have not complied with that doctrine in presenting Dr. Spock during the last three weeks of the campaign (two months, in the case of NBC); and require that they make some

effort, even at this late hour, to come into compliance with that doctrine. The Commission is seldom more precise than this in ordering relief in fairness cases, and I would not be so here.

I need not, and do not, for the purposes of this separate opinion, reach or pass upon ABC's compliance with the fairness doctrine. I believe all would agree its performance was better than that of CBS or NBC. Whether it was enough better to distinguish it in law is an issue that the majority, necessarily, does not reach.

To find that zero coverage is adequate, however, is a resolution I cannot abide. Therefore, I dissent.

F.C.C. 72–1087

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Section 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (WEST ALLIS, BERLIN, HARTFORD, NEENAH-MENASHA, SHAWANO, WATERTOWN, AND WAUPUN, WIS., AND ESCANABA, MICH.; COAL CITY, DWIGHT, OR MARSEILLES, ILL.; ST. CHARLES AND ST. LOUIS, MO.; MUNCIE, IND. AND CELINA, FOSTORIA, AND LIMA, OHIO; ANAMOSA AND IOWA CITY, IOWA; TERRELL AND CORSICANA, TEX.; SULLIVAN, BEDFORD, AND PAOLI, IND.; ORANGEBURG, S.C.; DANVILLE, IND.; DECATUR OR PARIS, ILL.; MANNING AND KINGSTREE, S.C.)	Docket No. 19161 RM–1476 RM–1554 RM–1489 RM–1559 RM–1523 RM–1561 RM–1524 RM–1563 RM–1528 RM–1566 RM–1540 RM–1571 RM–1552 RM–1626 RM–1660

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 5, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition for reconsideration filed by Muncie Broadcasting Corporation, Muncie, Indiana (Muncie Broadcasting), oppositions filed by Seneca Radio Corporation, licensee of Stations WFOB and WFOB–FM, Fostoria, Ohio (Seneca Radio), and Johnston Broadcasting, Inc., licensee of Stations WCSM and WCSM–FM, Celina, Ohio (Johnston Broadcasting), and a reply to opposition filed by Muncie Broadcasting.

2. In the Second Report and Order of the above-entitled proceeding, released on January 7, 1972, FCC 72–21, 32 F.C.C. 2d 839, 23 R.R. 2d 1692, the Commission denied the petition of Muncie Broadcasting requesting an assignment of FM Channel 244A to Muncie, Indiana. The proposal required changing the assignments of three existing FM stations: Channel 249A for Channel 244A at Celina, Ohio, licensed to Station WCSM–FM; Channel 244A for Channel 249A at Lima, Ohio, licensed to Station WTGN; and Channel 249A for Channel 244A at Fostoria, Ohio, licensed to Station WFOB–FM. In denying the petition, the Second Report and Order noted that the channels were assigned on the basis of distance separation between communities and protection of the service contours was provided by this procedure; that in general, the proposed channels may be assigned without any violation of the minimum spacing requirements, but these stations would be located closer to other stations than they were situated presently, and this would result in loss of service to the areas provided beyond the 1 mV/m contours; and that in the case of WCSM–FM and

WTGN, this would hold, but as to WFOB–FM, there would be a loss of service within its 1 mV/m contour as a result of Station WNCI, Columbus, Ohio, which was operating with 185 kw, E.R.P., and effective antenna height of 570 feet. We stated therein that we must take into account the loss of existing service as one of the factors in a rule making decision but such loss beyond the normally protected distance should not stand in the way of a desirable additional assignment such as a second channel to a sizeable community such as Muncie, but that the loss to the Fostoria station, because a "super-maximum" facility is involved, would be greater than this. The Second Report and Order also noted Muncie Broadcasting's contentions that, if WFOB–FM were to increase its antenna to the maximum allowable height of 300 feet for 3 kilowatts power, the service to the Carey, Ohio, area would be restored and the suggestion of the use of a vertically polarized antenna to improve coverage in order to overcome the interference that would be caused by Station WNCI. However, we observed that Muncie Broadcasting did not state that it would be responsible for the cost of making the necessary changes in the facilities, i.e., other than the cost involved in moving from one channel to another, and that WFOB–FM should not be expected to expend additional funds in order to overcome the interference that may be obtained as a result of a change in the channel assignment.

3. In its petition for reconsideration, Muncie Broadcasting states that since WFOB–FM is not operating at the maximum facility authorized for a Class A station, WFOB–FM with an increased tower height and a circular polarized antenna would push any interference WFOB–FM might receive well beyond its existing service area, plus result in a substantial gain in total coverage. It asserts that the integrity of the WFOB–FM service contour would be preserved, and the public interest enhanced further with a second FM assignment to the sizeable community of Muncie, the seat of Delaware County. It states that it is willing and able to incur the cost of changeover at WFOB–FM which approximates $12,520, in addition to the reimbursable costs for changeover at Stations WCSM–FM and WTGN (FM).

4. Seneca Radio in opposition contends that the reimbursement of expenses is only a small part of the problem which would face WFOB and WFOB–FM as a result of Muncie's proposal. It points out that its present FM antenna is mounted on the center tower of the three-tower directional antenna system—205 foot towers—of its AM Station WFOB operating with different patterns day and night, and that replacement of the center tower with a 325 foot tower would require redesigning the directional antenna system with attendant allocation studies and filing of a new application for construction permit on the antenna design and protection requirements day and night, a new phasing equipment and a complete proof of performance would be required on both day and night arrays. It also argues that locating a tall tower external to the AM directional antenna system on the WFOB property would create a problem of reradiation of AM signal from the FM tower which would have deleterious effect on the AM operation. Under these conditions, Seneca Radio asserts, engineering

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studies would be required to determine the proper location of the tall tower on the WFOB property, the permissible reradiation, the detuning requirements and whether this possibility is even feasible, considering the protection requirements day and night, and a proof of performance would be required on both arrays to establish compliance with the station's instrument of authorization.

5. In reply Muncie Broadcasting states that Seneca Radio creates the possibility of additional expenses; and while terming petitioner's estimate of $12,520 for changeover costs at WFOB–FM ridiculously low, it proffers only generalizations without setting forth any specifics. It asserts that Seneca Radio's opposition relates solely to private interests, while avoiding the overall public interest considerations, contending that the Commission has recognized the desirability of providing an additional FM channel to Muncie, if possible. Muncie Broadcasting argues that the Commission has on numerous occasions in the past allocated an FM channel to a community which allocation required the changeover of an existing authorization and the fact that three existing authorizations must make changeovers is one of degree and certainly cannot erode the public interest consideration of need.

6. Johnston Broadcasting also opposes the Muncie Broadcasting's petition for reconsideration, contending that the petition is defective under Section 1.106 of the Commission's Rules and should be rejected. It asserts that Muncie Broadcasting, for the first time, offers to reimburse WFOB–FM for the cost of improving its facilities to recoup service area that would be lost by the proposed switch in channel, but that it cannot state that the facts relied on in its petition for reconsideration have occurred since its last opportunity to present such matters or were unknown to Muncie Broadcasting until after the last opportunity because, in its comments on the proposed rule making, filed May 12, 1971, it supplied an engineering statement which describes the method by which WFOB–FM could recoup service area losses as a result of the switch. Further, the new facts, Johnston Broadcasting insists, do not raise any additional public interest questions with regard to the Commission's decision denying the requested rule making.

7. We agree with the Johnston Broadcasting contention. Although it now offers to pay for a new tower, a new FM antenna and additional transmission line, Muncie Broadcasting suggested earlier the manner in which the Station WFOB–FM coverage area could be enlarged, recouping the service area that would be lost in the change of channel assignment. Moreover, as stated by Seneca Radio in its opposition, a substitution of a 325 foot tower for a 205 foot tower, which is part of a three element directional array, would create additional problems of redesigning the directional antenna system. A substitution of a tall tower as suggested by Muncie Broadcasting would alter the electrical characteristics of a directional antenna system, with a resultant change in the signal radiation pattern of a standard broadcast station. An alternative solution of erecting a tower on the WFOB property in the vicinity of a directional antenna system would create a re-radiation problem, also affecting the signal radiation pattern. In either case, there would be additional cost for redesigning the directional array

or detuning the re-radiating signal and proof of performance measurements. As we have stated in the Second Report and Order, WFOB–FM should not be expected to expend additional funds in order to overcome the interference that may be obtained as a result of a change in the channel assignment. Further, even if WFOB–FM were to increase its tower height to 300 feet above average terrain, interference would be still caused within its 1 mV/m contour—the basis for denial in the first instance. We will therefore reaffirm our previous ruling on this matter.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed February 12, 1972, by Muncie Broadcasting Corporation IS DENIED, and our action in this matter IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1050

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of HARRISCOPE BROADCASTING CORP. (KØ6FE), MILES CITY, MONT. THE MONTANA NETWORK (K10GF), MILES CITY, MONT. For Renewal of Licenses	File No. BRTTV-1985 File No. BRTTV-2041

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned applications of Harriscope Broadcasting Corporation (Harriscope), licensee of television station KULR-TV, channel 8, Billings, Montana (NBC, ABC), seeking renewal of the license of television translator station KØ6FE, Miles City, Montana (BRTTV-1985), and The Montana Network (Montana Network), licensee of television station KOOK-TV, channel 2, Billings, Montana (CBS, NBC), seeking renewal of the license of television translator station K10GF, Miles City, Montana (BRTTV-2041). The Commission also has before it for consideration petitions to deny both applications, filed June 30, 1972, by Custer Broadcasting Corporation (petitioner), licensee of television station KYUS-TV, channel 3, Miles City, Montana (NBC, ABC), and various pleadings filed in connection therewith.[1] Both translator stations are authorized to operate on channels listed in the Television Table of Assignments (section 73.606(b) of the Commission's rules) with transmitter output power of 100 watts.

2. Petitioner claims standing as a "party in interest" within the meaning of section 309(d) of the Communications Act of 1934, as amended, on the grounds that station KYUS-TV competes in Miles City with the two translator stations for viewership and economic support. Although the translator stations generate no revenue directly, it is clear that they divert some viewership and, consequently, may cause some economic injury to petitioner. We find that petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

[1] In connection with the Harriscope application, Harriscope filed, on August 3, 1972, an opposition to the petition to deny and a supplement thereto on August 14, 1972; petitioner filed a reply on September 22, 1972, and Harriscope filed, on October 24, 1972, a request for leave to file an additional statement and the additional statement; in connection with the Montana Network application, an opposition to the petition to deny was filed August 7, 1972, by Montana Network and a supplement thereto on August 11, 1972; petitioner filed a reply on September 22, 1972.

3. The heart of this matter is the request of petitioner that the Commission invoke the provisions of section 74.732(f) of its rules [2] to terminate operation of both translator stations. Petitioner alleges that the translators operate within the city of license of station KYUS–TV and duplicate the network program offerings of station KYUS–TV. The stations are, it is alleged, operating in violation of section 74.732 (e) (2) of the Commission's rules [3] because they are located beyond the predicted Grade B contours of their primary stations and within the predicted Grade A contour of a television station assigned to a different community, whose programs they duplicate. Harriscope has asked for a waiver of section 74.732(e) (2) of the rules and has indicated its willingness to provide same-day non-duplication protection to station KYUS–TV; Montana Network resists a non-duplication provision altogether.[4]

4. The controlling law in this case is clear and well established. We have held, as a matter of policy, that, within its own city of license, a television station is entitled to program exclusivity against translator stations. *Cedar Rapids Television Company (K82AL)*, 23 FCC 2d 969, 19 RR 2d 358; *J. R. Karban (W73AD)*, 18 FCC 2d 39, 16 RR 2d 469; *Storm King Television, Inc.*, 19 FCC 2d 876, 17 RR 2d 461; *Storm King TV Association, Inc.*, 20 FCC 2d 348, 17 RR 2d 839.[5] The two translator stations began operating in Miles City in late 1968 and station KYUS–TV commenced operation in September 1969. Application of our policy would clearly have prohibited grant of the translator applications had KYUS–TV been operational at the time the translator applications were pending. It is equally clear, therefore, that we may terminate operation of both translators pursuant to section 74.732 (f) of the rules. This, however, we are not prepared to do.

5. No one disputes the fact that both Billings stations provide valuable local programs plus a vast array of network programs which are not offered by station KYUS–TV. In our opinion, the public interest would be disserved by termination of these stations, for we could not justify the loss of such programs without any prospect for replacement. *Hall* v. *Federal Communications Commission*, 99 U.S. App. D.C. 86, 237 F 2d. 567, 14 RR 2009. Although petitioner asks that, if we grant the applications subject to non-duplication conditions, the conditions afford one-week program exclusivity, we can find no justification for this extraordinary protection. Montana Network resists any program exclusivity provisions because it alleges that the amount of program duplication is so insignificant that it would constitute an unwarranted

[2] Section 74.732(f) of the rules provides, insofar as it applies to this case, that where a licensee-owned VHF translator serves an area beyond its primary station's predicted Grade B contour and within the predicted Grade B contour of another television station assigned to a different community, its authorization is subject to the condition that it may be terminated by the Commission at any time upon sixty days' notice if the circumstances in the community or area have so changed that, had those conditions existed at the time of the filing of the application, the application would not have been granted.

[3] Section 74.732(e) (2) of the rules prohibits a licensee-owned VHF translater within the predicted Grade A contour of a television station whose programs it will duplicate.

[4] By an order released April 14, 1971 (*Micro–TV, Inc.*, 28 FCC 2d 658, 21 RR 2d 761), the Commission required the Miles City cable television system to provide program exclusivity to station KYUS–TV against stations KULR–TV and KOOK–TV. While this action is not controlling with respect to whether the translators should be required to provide the same type of protection, we think it appropriate to recognize it for the purpose of placing the television situation in Miles City in perspective.

[5] There is pending, in Docket No. 19121 (*Notice of Proposed Rule Making*, 27 FCC 2d 94) a proposal to codify this policy by amendment of section 74.732(e) of the rules.

hardship to require program exclusivity, causing increased wear of its equipment and disrupting viewing habits. These are not persuasive arguments nor do they counterbalance the strong public interest considerations inherent in the survival of Miles City's only television station. Other than standard radio station KATL, station KYUS–TV represents this community's only means of local self-expression and it is obvious that we must act to protect its viability. By continuing the life of the translators and protecting station KYUS–TV's program offerings against duplication, we can assure the public of the availability of a wide choice of programs, both network and local. We find, therefore, that grant of the applications, subject to same-day non-duplication conditions, would serve the public interest, convenience and necessity.[6] WLVA, *Incorporated* (*WØ5AA*), 14 FCC 2d 660, 14 RR 2d 200; reconsideration denied, 16 FCC 2d 779, 14 RR 2d 1161. Since we are granting the applications subject to conditions other than those requested by the applicants, the applicants may, pursuant to section 1.110 of the Commission's rules, reject the grants as conditioned, and, upon receipt of such written rejections, we will set aside the grants and designate the applications for hearing. *WGAL Television, Inc.* (*W80AJ*), 22 FCC 2d 950, 18 RR 2d 1210.

Accordingly, IT IS ORDERED, That the petitions to deny filed herein by Custer Broadcasting Corporation ARE GRANTED to the extent indicated and otherwise ARE DENIED.

IT IS FURTHER ORDERED, That section 74.732(e)(2) of the Commission's rules IS WAIVED, and the application of Harriscope Broadcasting Corporation for renewal of the license of television broadcast translator station KØ6FE, Miles City, Montana, IS GRANTED SUBJECT TO THE FOLLOWING CONDITION:

"Television broadcast translator station KØ6FE, Miles City, Montana, upon the request of the licensee of television station KYUS–TV, channel 3, Miles City, Montana, shall not duplicate simultaneously or on the same day, a program broadcast by such television broadcast station."

IT IS FURTHER ORDERED, That section 74.732(e)(2) of the Commission's rules IS WAIVED, and the application of The Montana Network for renewal of the license of television broadcast translator station K10GF, Miles City, Montana, IS GRANTED SUBJECT TO THE FOLLOWING CONDITION:

"Television broadcast translator station K10GF, Miles City, Montana, upon the request of the licensee of television station KYUS–TV, channel 3, Miles City, Montana, shall not duplicate simultaneously or on the same day, a program broadcast by such television broadcast station."

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[6] Same-day non-duplication protection in the Mountain Time Zone, within which Miles City is located, is harmonious with the provisions of the cable television rules, section 76.93(b).

F.C.C. 72-1056

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF HARVIT BROADCASTING CORP., LICENSEE OF RADIO STATION WBTH, WILLIAMSON, W. VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 30, 1972)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated October 21, 1972, addressed to Harvit Broadcasting Corporation, licensee of Radio Station WBTH, Williamson, West Virginia, and (2) licensee's response, dated December 23, 1971, to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture in the amount of two thousand dollars ($2,000) was issued for your apparent willful or repeated failure to observe the terms of the license of WBTH and violation of Section 73.87 of the Commission's Rules, by operating with full daytime power of 1,000 watts on dates and at times hereinafter indicated, when the authorized power was 250 watts.

3. The license for WBTH authorizes operation with 1,000 watts as follows, in Eastern Standard Time:

November 7:15 a.m. to 5:15 p.m.
December 7:30 a.m. to 5:15 p.m.
January 7:45 a.m. to 5:30 p.m.
February 7:15 a.m. to 6:00 p.m.
March 6:45 a.m. to 6:30 p.m.

The inspection of March 30, 1971, indicated that WBTH was operated during presunrise hours with power of 1,000 watts, in Eastern Standard Time, as follows:

November 13, 1970 6:31 a.m.	December 1, 1970 7:16 a.m.
November 16, 1970 6:31 a.m.	January 4, 1971 7:31 a.m.
November 17, 1970 6:31 a.m.	January 5, 1971 7:31 a.m.
November 25, 1970 6:31 a.m.	January 6, 1971 7:31 a.m.
November 26, 1970 6:31 a.m.	January 8, 1971 7:31 a.m.

and that the station was operated during post-sunset hours, in Eastern Standard Time as follows:

November 19, 1970 5:25 p.m.	January 20, 1971 5:36 p.m.
November 23, 1970 5:25 p.m.	January 31, 1971 6:25 p.m.
December 1, 1970 5:23 p.m.	February 12, 1971 6:17 p.m.
December 4, 1970 5:24 p.m.	March 24, 1971 7:15 p.m.
January 6, 1971 7:15 p.m.	

4. Your response to the Notice of Apparent Liability does not deny this operation with unauthorized power, but requests remission of the forfeiture or reduction in the amount thereof for the reason that corrective action was taken before the inspection and that the amount is excessive considering two cases wherein the amount of forfeiture was determined to be $750 and $1,000. In assessing forfeitures, the Commission considers many factors, including the financial condition of stations. An examination of the two cases cited by you reveals that they involved factors not present in the instant proceeding.

5. We find that you have repeatedly failed to observe the terms of the license for WBTH and violated Section 73.87 of the Commission's Rules by operating WBTH with unauthorized power as heretofore specified, and we are not persuaded to remit the forfeiture or reduce the amount thereof. Since we have found that the violation was repeated, it is not necessary that we make an additional determination as to willfullness of the violation. *Paul A. Stewart*, FCC 63-411, 25 RR 375 (1963).

6. In view of the foregoing, IT IS ORDERED, That Harvit Broadcasting Corporation, licensee of Radio Station WBTH, Williamson, West Virginia, FORFEIT to the United States the sum of two thousand dollars ($2,000) for repeated failure to observe the terms of the license for WBTH and violation of Section 73.87 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Harvit Broadcasting Corporation, licensee of Radio Station WBTH, Williamson, West Virginia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-999

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of HAWAIIAN TELEPHONE CO. AND AMERICAN TELEPHONE & TELEGRAPH CO. Concerning Interconnection With RCA for Foreign Exchange Telephone Service	File No. T-C-2033

NOVEMBER 8, 1972.

HAWAIIAN TELEPHONE CO.,
Post Office Box 2200,
Honolulu, Hawaii 96805

Attention: Mr. William C. Rowland, President.

AMERICAN TELEPHONE & TELEGRAPH CO.,
2000 L Street NW.,
Washington, D.C. 20036

Attention: Mr. D. E. Emerson, Vice President, Federal Regulatory Matters.

GENTLEMEN: The Commission today adopted a Memorandum Opinion and Order affirming the Telegraph Committee's action of June 8, 1972 (File No. T-C-2033 et al) granting authority to RCA Global Communications, Inc. for the offering of pure voice leased channel service between the U.S. mainland and Hawaii. Review of such action by the full Commission had been sought by Hawaiian Telephone Company.

It has been brought to the Commission's attention that both Hawaiian and American Telephone and Telegraph Company have so far refused to interconnect with RCA so that it may offer foreign exchange telephone service between the mainland and Hawaii, although it appears that AT&T has no objection to such interconnection if Hawaiian is willing to so interconnect.

Since both Hawaiian and AT&T presently provide such foreign exchange service, and in light of the Commission's action today affirming the grant by the Telegraph Committee, your continued refusal to interconnect with RCA so that it may participate in a similar service would raise substantial questions under the Communications Act and antitrust laws.

Although normally the questions raised by a refusal to interconnect would call for more formal action, we are writing to both Hawaiian and AT&T to afford them an opportunity to voluntarily interconnect with RCA. This would, of course, make any further action by the Commission unnecessary in this matter.

It would be appreciated if you would advise the Commission of the action you are taking with respect to the question of interconnection with RCA and other international record carriers no later than November 20, 1972.

Commissioners Johnson and Reid concurring in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1094

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re:	CAC-117
INFORMATION TRANSFER, INC., CLYDE, LYONS,	CAC-118
NEWARK, AND PALMYRA, N.Y. FOR CERTIFI-	CAC-120
CATE OF COMPLIANCE	CAC-121

MEMORANDUM OPINION AND ORDER

(Adopted December 1, 1972; Released December 5, 1972)

BY THE COMMISSION:

1. Information Transfer, Inc., operates a cable television system at Newark, New York, and holds franchises for additional systems at Clyde, Lyons and Palmyra, New York, small communities located in or near the Rochester, New York television market (the 56th largest). It has applied for Certificates of Compliance to add a number of television signals to its existing system at Newark and to commence operations in the other three communities. For Clyde, Lyons, and Palmyra, Information Transfer requests certification of its proposal to carry the following signals:

WROC–TV (Ch. 8, NBC) Rochester, New York
WHEC–TV (Ch. 10, CBS) Rochester, New York
WOKR–TV (Ch. 13, ABC) Rochester, New York
WXXI (Ch. 21, Edu) Rochester, New York
WSYR–TV (Ch. 3, NBC) Syracuse, New York
WHEN–TV (Ch. 5, CBS) Syracuse, New York
WCNY–TV (Ch. 24, Edu) Syracuse, New York
WNYS–TV (Ch. 9, ABC) Syracuse, New York
WOR–TV (Ch. 9, Ind) New York City, New York
WPIX (Ch. 11, Ind) New York City, New York

The application submitted for the Newark system, which now carries the Rochester stations, proposes the addition of the Syracuse and New York City signals listed above. Statements concerning its non-broadcast access program, required by § 76.251 of the Rules, were filed as part of these applications.

2. These applications are opposed by Rust Craft of New York, Inc., licensee of Station WROC–TV, Rochester, New York, and the Rochester Area Educational Television Association (and hereinafter referred to as "RAETA"), licensee of Television Broadcast Station WXXI, Rochester, New York. Rust Craft suggests that because Information Transfer has made no showing that New York City is, in fact, one of the two closest of the twenty-five largest television markets, its applications are thereby deficient; moreover, Rust Craft asserts that these applications fail to demonstrate that sufficient access channels will be made available in each community. Finally, it is argued that a certification of these proposals will be a prelude to the extension of these same New York City television signals into the heart of the

Rochester market, a development to which Rust Craft "strongly objects." RAETA limits its opposition to the proposed carriage of the Syracuse educational Station WCNY–TV. Such carriage, into its "primary service area," would allegedly erode the local support which WXXI enjoys among cable television subscribers in Wayne County. This local support, manifested by financial contributions made to RAETA by the Wayne County Board of Supervisors and the Newark school, would be sapped if duplicating educational programming is available to Wayne County cable television subscribers. RAETA contends the carriage of WCNY–TV would abrogate an "understanding" it has with WCNY–TV which declares Wayne County to be in WXXI's primary support area, notwithstanding the fact that WCNY–TV places a predicted Grade B signal over the area. For this reason, RAETA requests special relief from the provisions of § 76.61(a) (2) of the Rules, which would otherwise authorize such carriage.[1]

3. In reply, Information Transfer characterized Rust Craft's opposition as being inadequate, as it failed to substantiate its assertion that other "Top-Twenty-Five" television markets may be more closely located to its proposed and existing systems than New York City. Calculations, based on the "Great Circle" method of determining such things, were submitted which indicated that New York City and its independent stations were nearer these communities than Cleveland, Ohio; Pittsburgh or Philadelphia, Pennsylvania; Waterbury or Hartford, Connecticut; and Worchester, Massachusetts, each of them being "Top Twenty-Five" markets with operating independent stations. Buffalo, New York, is an admittedly closer "Top-Twenty-Five" market, but Information Transfer points out that the Rules permit it to select from the *two* closest of such markets, and it has selected New York City. Its access program is stoutly defended; Information Transfer emphasizes that each system will provide its community with the required number of access channels, with a single studio serving them all with production and studio facilities. The fear that certification of these applications foreshadows a deeper thrust into the Rochester Market is dismissed as not being pertinent to the matter now at hand; there will be ample time and opportunity to treat such matters later. RAETA's argument against the carriage of WCNY–TV are answered thusly: (1) it has not been demonstrated that the carriage of WCNY–TV will in any way lessen the modest support WXXI now derives from Wayne County. WCNY–TV places a Grade B signal over the area and is available to many people there, yet financial support continues for the station; (2) the agreement to isolate Wayne County as a primary service area for WXXI is anti-competitive in nature and would restrict the public's access to other educational television programming; (3) the objection is squarely contrary to the Commission's stated policy against precluding the carriage of state-operated educational stations, such as WCNY–TV, in the same state as the cable community.

[1] § 76.61(a) (2) governs the carriage of educational stations by cable systems located in the major television markets. It provides that such systems may carry:
"Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located in whole or in part."

4. After examining the applications of Information Transfer and the objections lodged against them, we have concluded that the requirements of the cable television rules have been satisfied, and Certificates of Compliance will issue forthwith. The arguments of Rust Craft were more suggestive than assertive in their thrust, and they will be denied. The measurements of comparative distances were computed in correspondence to formulae the Commission approved several years ago [2] and we are satisfied that these calculations were correctly ascertained. Accordingly, the selection of two New York City independent stations was altogether appropriate. That the availability of this programming may represent at sometime a threat to the Rochester station is assuredly speculative in this case, given the location of these communities on the edge of the Rochester market and the smal number of potential cable subscribers involved.[3] The access program which Information Transfer intends to undertake has been comprehensively stated and complies with § 76.251 of the Rules. In a similar vein, RAETA has failed to convince us that the clear provisions of Section 76.61(a)(2) of the Rules should be ignored, to limit Wayne County cable television subscribers to one educational station. Our rules were intended to promote the widest possible dissemination of educational and public television programming.[4] We realize, of course, that educational stations operate under sometimes severe constraints, imposed by limited audiences and small budgets. Accordingly, local educational stations can interdict the carriage of distant educational signals by filing an objection with the Commission.[5] The same procedure is not available to local educational stations which wish to prevent the carriage of another local education station. First, there is a presumption at work that "[i]t would be a disservice to the public to deprive them of educational television service from local stations, and our market analysis does not indicate that large numbers of educational signals are available locally even in overlapping market situations." [6] It is thus not very meaningful to state, as a general proposition, that the provision of the signals of another local educational station (i.e., in the relatively few communities where it is local) will inevitably erode the public support a station now enjoys, particularly in its core city and environs. Second, our program exclusivity rules will protect much of the programming of a higher priority educational station from the profusion of duplicating educational signals. Testing RAETA's assertions against these considerations, we are not persuaded that there exists a compelling public interest to disregard the rules to exclude a few thousand cable television subscribers from the very type of programming the cable rules were designed to encourage. Finally, the "understanding" between RAETA and WCNY–TV, whereby Wayne County was designated a part of WXXI's primary support area, does not have the sanction of this Commission and is not dispositive of the signal car-

[2] See Appendix B in the *Further Notice of Proposed Rule Making in Docket 18397*, 22 FCC 2d 603 (1969).

[3] The 1970 population of Newark was 11,644; Lyons, 4,493; Palmyra, 3,776; Clyde, 2,828.

[4] The Commission's views on the carriage of educational programming are found at Paragraphs 94 and 95 of the *Cable Television Report and Order*, 36 FCC 2d 143, at 180 (1972).

[5] See our decision in Norristown Distribution Systems, Inc., — FCC 2d — (1972) for a discussion of this matter.

[6] Paragraph 12, *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, at 330 (1972).

riage issues present in this case. We expect to decide these maters on an *ad hoc* basis in the future, but this discussion will serve to indicate our general line of approach.

Accordingly, IT IS ORDERED, That the subject applications for Certificates of Compliance filed by Information Transfer, Inc., ARE GRANTED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificates of Compliance" filed by Rust Craft of New York, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objections to Carriage and Request for Special Relief", filed by the Rochester Area Educational Television Association ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1062

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
KING'S GARDEN, INC., LICENSEE OF STATIONS KGDN AND KBIQ-FM, EDMONDS, WASH.
Compliance With Sections 73.125 and 73.301

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 30, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT.

1. In *King's Garden, Inc.*, 34 FCC 2d 937 (1972), we found that King's Garden, Inc., licensee of Stations KGDN and KBIQ-FM, Edmonds, Washington, was discriminating in its employment practices on religious grounds in violation of Sections 73.125 and 73.301 of our Rules.[1] King's Garden was directed to submit a statement as to its future hiring practices and policies so as to comply with those sections. Now under consideration are the response of King's Garden and a letter from Mr. Trygve J. Anderson, whose complaint resulted in the issuance of the decision cited above. King's Garden has also filed a petition for rule making (RM-1999) to amend Sections 73.125 and 73.301 to exempt religious organizations. That petition will be considered at a later time and we make no judgment as to its merits in this decision.

2. There are no unresolved factual questions presented in this case. King's Garden discriminates on the basis of religion in hiring people to staff its broadcast stations. It does not comply with our first decision in this matter where we held that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules," 34 FCC 2d at 938. King's Garden contends in its response that the Civil Rights Act of 1964, as recently amended, and Constitutional considerations require that it should be entirely exempt from the requirements of the rules in question as to religious discrimination in employment. We disagree and affirm our prior holding for the reasons set out below.

3. Among the provisions of the Civil Rights Act of 1964 was a limited exemption from the requirements of that Act to permit religious organizations to discriminate on the basis of religion "with respect to the employment of individuals of a particular religion to

[1] Sections 73.125, 73.301 and 73.680 are identically worded. They state in part: (a) *General policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard, FM, television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex.

perform work connected with . . . its religious activities." On March 24, 1972, the Equal Employment Opportunity Act of 1972 was approved, Public Law 92–261, 86 Stat. 103. The newly enacted statute changed the quoted language to permit religious discrimination by religious organizations in hiring persons "to perform work connected with . . . its activities." The change was made to expand "the exemption for religious organizations from coverage under this title with respect to the employment of individuals of a particular religion in all their activities instead of the present limitation to religious activities." *Joint Explanatory Statement of Managers at the Conference (on P.L. 92–261)*, 1972 U.S. Code Congressional and Administrative News, 1047, 1048.

4. King's Garden notes that our nondiscrimination rules are based in large measure on the Civil Rights Act of 1964. It urges in its rule-making petition that our Rules should be amended to reflect the changes in the Civil Rights Act noted above. It urges in this proceeding, in the alternative, that we should interpret our present nondiscrimination rules to permit discrimination on religious grounds when practiced by licensees that are religious organizations. This, it is asserted, would bring our rules into conformity with the amendments to the Civil Rights Act.

5. The interpretation requested by King's Garden would strike the work "religion" from the nondiscrimination rules as to a substantial number of licensees, and would be a change of our policy. We do not believe that such a substantial change can properly be termed an interpretation. Accordingly, to the extent that King's Garden seeks a change in our policy, we shall consider the proposed change in the rule-making proceeding. In this decision we shall consider King's Garden's contention that the present rules are invalid because of Constitutional considerations or because of recent amendments to the Civil Rights Act.

6. The Civil Rights Act and amendments to it are not part of our enabling statute, and the former does not encompass the whole or the public interest standard imposed on us by the latter. This is obvious from the fact that our rules differ from the requirements of the Civil Rights Act. For example, our rules, other than reporting requirements, apply to all licensees regardless of the number of employees. The Civil Rights Act applies only to employers with 25 or more employees.[2] In addition, when the nondiscrimination rules were adopted, we pointed out that the rules were based on the policy set out in the Civil Rights Act *and* our requirement that broadcast stations operate in the public interest. Our concept of the public interest includes the duty of a broadcast station to serve the entire community. "A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public," *Nondiscrimination in Employment Practices*, 13 FCC 2d 766, 770 (1968).[3] It is evident, therefore, that in the area of nondiscrimination in employment, we have considered factors other than the Civil Rights Act and that those factors have been considered in rule-making pro-

[2] In March 1973, the limit will be reduced to 15 employees.
[3] Further changes in our nondiscrimination rules were made in *Nondiscrimination in Employment Practices*, 23 FCC 2d 430 (1970).

ceedings. We conclude that King's Garden is not relieved of its obligation to comply with existing rules by a change in the Civil Rights Act or by the filing of a rule-making petition. Its obligation would be changed if the recommended changes were adopted in a rule-making proceeding, upon a public interest finding under the Communications Act.

7. There remains for consideration only King's Garden's contentions that the existing rules, as applied to it, violate the First Amendment to the Constitution. It asserts that we have assumed the responsibility of defining "religious activities" and "religious Philosophy," which leads to governmental definition of religious belief and activity. Our prior ruling, according to King's Garden, "failed to give proper recognition and weight to (its) contentions that its broadcast activities represented . . . a 'religious activity,'" citing *U.S.* v. *Seeger*, 380 U.S. 163 (1965). King's Garden notes that religious beliefs may not be limited to traditional or parochial concepts of religion, *Welsh* v. *U.S.*, 398 U.S. 333 (1970). The Supreme Court's decision in *Wisconsin* v. *Yoder*, ——U.S.——, 92 S.Ct. 1526 (1972), holding that Amish school children are exempt from state compulsory school attendance laws, is cited as an example of the wide freedom afforded religious groups under the First Amendment. King's Garden characterizes the above cases as follows:

> Central to the Court's holding in the cited cases is that any governmental intrusion into religious beliefs and practices is permissible only when absolutely essential by reason of some other overriding public necessity; and, further, that even in those cases the government must give the widest possible effect to varying views and philosophies.

To avoid these alleged Constitutional questions, King's Garden urges that its employment practices be declared wholly permissible.

8. King's Garden's contentions go to alleged interference with the practice of its religion. We are dealing, therefore, with the free exercise clause of the First Amendment. Generally, we can state that reasonable, nondiscriminatory regulations governing the conduct of King's Garden, as distinguished from its beliefs, are Constitutionally permissible, *U.S.* v. *Kissinger*, 250 F. 2d 940 (3rd Cir. 1958). Furthermore, the Supreme Court has stated, ". . . it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *School District of Abington* v. *Schempp*, 374 U.S. 203, 223 (1963). We note first that King's Garden can practice its religion without holding a broadcast license. Second, there is no "coercive effect" here, since we did not compel King's Garden to become a licensee. (This fact distinguishes *Wisconsin* v. *Yoder*, above.) "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations," *United Church of Christ* v. *FCC*, 359 F. 2d 994, 1003 (D.C. Cir. 1966). King's Garden, having voluntarily sought a license and the privileges that go with it, can not now be heard to argue that it can avoid the public obligations imposed on all licensees because it is "coerced." If King's Garden is not willing to accept its obligations, as set out in the rules in question, it need not retain its license.

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9. We exempted from the nondiscrimination rules those employed by King's Garden to espouse its particular religious philosophy over the air. King's Garden contends that this puts us into the position of defining religious philosophy. We are not called upon at this point to make that definition. In any event, while admittedly an area requiring circumspection, definitions as to what constitutes a religious philosophy or activity have frequently been dealt with in the courts and by administrative agencies.[4] For example, cases involving draft deferments on religious grounds [5] and tax cases where church properties are exempt from property taxes often involve questions as to what is or is not a religious belief or activity. When and if the question should be presented to us, it can be answered without treading on First Amendment rights.

10. We have never recognized a right of religious organizations holding broadcast authorizations to use a station solely to promote their own religious views. As we noted in our prior decision, the two stations must be operated in the public interest, not solely in the interest of its particular religion.[6] King's Garden must ascertain secular community problems and needs, and devote a portion of its broadcast time to meet those problems and needs. See our *Report and Order in Docket No. 18774*, in which we adopted the Primer on the ascertainment of community problems by broadcast applicants, 27 FCC 2d 650, 652–3 (1971). It must also have a policy of making time available for the presentation of other religious views, *Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938). Thus, in our prior decision, we did not fail to consider King's Garden's contentions that it considered its broadcast activities to be part of its religious activities. We considered the contention and rejected it as erroneous.

11. In view of the above, we shall affirm our prior decision in this matter. Moreover, we are concerned with the apparent equation of broadcast and religious activities made by King's Garden. This raises a question as to its compliance with the policy set out in the *Young People's* case, above. Therefore, we shall also require King's Garden to submit a statement as to its policies as to making time available for the presentation of religious views other than its own.

12. Accordingly, IT IS ORDERED, That King's Garden, Inc., is directed to submit within twenty (20) days of the release of this Memorandum Opinion and Order, (a) a statement as to its future hiring practices and policies with respect to the requirements of Sections 73.125 and 73.301, and (b) a statement as to its policy with respect to making time available for the presentation of other religious views.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] The interpretation requested by King's Garden does not resolve the definition problem. The question as to what is or is not a religious organization would still remain.

[5] *U.S.* v. *Seeger* and *Welsh* v. *U.S.*, cited in paragraph 5, are examples of such cases.

[6] See *James A. Noe & Co.* v. *FCC*, 260 F. 2d 739 (D.C. Cir. 1958), where the Court stated that in determining whether a particular station would meet the problems and needs of a community, the religious orientation of the applicant is an irrelevant factor.

F.C.C. 72-1055

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LAKES AREA BROADCASTING CO., LICENSEE OF STATIONS KOLS AND KKMA (FM), PRYOR, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 30, 1972)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. In *Lakes Area Broadcasting Co.*, FCC 72-747, 25 RR 2d 226 (1972), we ordered that Lakes Area Broadcasting Co. (Lakes) forfeit $2,000 for violation of several of our rules. Now under consideration is Lakes' application for mitigation or remission of forfeiture, filed October 2, 1972.

2. Monitoring of Station KKMA(FM) revealed that in making official station identification announcements, the city of license did not immediately succeed the station's call letters, as required by Section 73.1201(b)(1) of our Rules.[1] For example, one such announcement was in the following form: "* * * The time is 29 minutes after the hour of 9:00 and you're listening to Owasso Radio Service * * * until 11:30 tonight—got two more hours to go—stay with us—over KKMA(FM), 104.5 on your FM dial, headquarters studio in Pryor, studios in Vinita—and studios in Owasso." In its application for mitigation or remission, Lakes contends: that this announcement was better than that required by the rule; that the licensee has neither the desire nor the necessity to mislead anyone as to the location of KKMA (FM); that if the wording violates the rule, it is a minor infraction; that the wording of the required station identification announcements was corrected immediately; and that the infraction was a "victimless crime."

3. Although Lakes considers its announcement to be "better" than those required by the rule, we do not. The terms of the rule are clear and unequivocal, and Lakes did not meet those terms. Each licensee has a primary obligation to serve the problems and needs of its city of license, and the station identification requirement is one of the several means we have adopted to achieve that end. A clear identification of the station with the city of license "aids its residents in judging the station's responsiveness to the city's problems and draws attention to

[1] Section 73.1201(b)(1) provides: "Official station identification shall consist of the station's call letters immediately followed by the name of the community or communities specified in its license as the station's location."

the station as an outlet for local self expression, and public service programming and announcements." *Lakewood Broadcasting Service, Inc.*, FCC 72-862, 25 RR 2d 397 (1972). We have adopted a specific form in the station identification rule, which, in our view, clearly ties the station to the city of license. The announcements in question here violated the rule and the contention that Lakes had no need or intention to mislead its listeners as to its licensed location is irrelevant in this context. Although Lakes may consider the violation to be minor, that factor, if true, enters only into the determination as to the amount of the forfeiture, not the determination as to whether a forfeiture should be imposed. The amount of the forfeiture will be discussed more fully below in paragraph 10. Characterizing the violation as a "victimless crime" does not absolve Lakes. Most of our rules are not designed to protect specific individuals, but were adopted to protect the public interest generally.

4. Finally, Lakes asserts that the violation was corrected immediately. In connection with the violation of Section 73.1201(b)(1) and elsewhere in its pleadings as to other violations, Lakes indicates that, in its view, such corrective action renders moot the assessment of a forfeiture. This is not the case. We have often indicated that licensees are not excused for past violations because of subsequent correction action. See, for example, *Executive Broadcasting Corp.*, 3 FFC 2d 699 (1966). The reason for this policy is readily apparent:

> **Forfeitures were authorized to obtain greater compliance by licensees with the terms of their licenses and the Commission's Rules, and to deter non-compliance. If serious, repeated violations are excused without sanction, the sanction of forfeiture will not be the effective tool it was intended to be. Rather than be deterred, licensees would be encouraged to continue violating Rules and to depend upon their excuses and promises to avoid liability. [*Crowell-Collier Broadcasting Corp.*, FCC 61-989, 21 RR 921, 927 (1961)].**

Thus, Lakes' assertion of corrective action, if accepted, would not serve to attain compliance with our Rules. Rather, it would encourage violations, because the sanction could be withdrawn on the assertion that, subsequent to being caught, the violations were corrected.

5. Lakes was also cited for leading or attempting to lead its listeners to believe that Station KKMA(FM) was authorized to identify itself with cities other than Pryor, in violation of Section 73.1201(b)(3) of our Rules.[2] For example, on several occasions, the following announcement was broadcast, "You're listening to Vinita Radio Service, studio, 123 East Illinois, Vinita, Oklahoma, KKMA(FM), 104.5 on your FM Dial, headquarters studio Pryor, studios Vinita and studios in Owasso, Oklahoma * * *" Other examples include: "This again is Owasso Radio Service * * * (more music) * * * 14 minutes until the hour of ten o'clock. You're listening to the big, happy, beautiful sound of gospel music, from Owasso, Oklahoma, and we'll be with you until 11:30 tonight. 200,000 watts of power ERP—100,000 vertical, 100,000 horizontal, to serve Owasso, the greater metropolitan Tulsa area, and mid-America."; "Wally Dale's my name, as we continue from Vinita

[2] Section 73.1201(b)(3) provides, in part: "A licensee shall not in any identification announcements, promotional announcements or any other broadcast matter either lead or attempt to lead the station's audience to believe that the station has been authorized to identify officially with cities other than those permitted to be included in official station identifications * * *."

Radio service until nine today."; and "Fifteen minutes before seven o'clock, welcome back to more from Vinita Radio Service over KKMA (FM)."

6. In its application, Lakes contends that, notwithstanding the above statements, there has been no showing that there was an intent to mislead. However, under the rule, intent is not the only basis for finding a violation. We need only find that the announcements mislead the audience, and in making that determination "* * * proof of actual deception of listeners as to a station's licensed location is not necessary, but * * * the likelihood or capacity to mislead is the standard by which we should judge a station's announcements or other broadcast matter as to its compliance with Section 73.1201(b)(3)," *Lakewood Broadcasting Service, Inc.*, 25 RR 2d 397, 399–400, footnote omitted. In our judgment, announcements such as those quoted above, are likely or have the capacity to mislead listeners to believe that the station is authorized to identify with Vinita or Owasso. Accordingly, we find no basis for remission of the forfeiture based on Lakes' contentions as to violations of Section 73.1201(b)(3).

7. Lakes was also cited for using class "C" telephone lines for transmitting voice and music from two auxiliary studios to the KKMA (FM) transmitter. Such lines do not provide the requisite quality signal to meet the electrical performance standards set out in Section 73.317 of our Rules. In its application, Lakes states that nothing better than class "C" lines were available; that equalizing equipment was not available; that the lines used showed generally low noise levels and comparatively good response; and that the lines were used primarily, but apparently not exclusively, for voice transmissions. Lakes' statements do not relieve it of liability. It could have sought microwave studio-transmitter links under Part 74 of our Rules, or it could have filed a request for waiver of the rule, citing the circumstances above. Lakes elected neither of these courses of action, and, without regard to the rule, went on a course of its own choosing. We cannot and do not condone such activities.

8. Section 1.526 of our Rules sets out the materials that must be kept available for public inspection at each broadcast station. Upon inspection, it was found that all the required materials were not in the public inspection file at Stations KOLS and KKMA(FM), notably the materials required under Sections 1.526(a)(4), 73.120(d), and 73.290(d) pertaining to broadcasts by candidates for political office. Lakes offers no comment on this violation.

9. Each of the rules noted in the preceding paragraph also requires that the public, upon request, have access to the files. Mr. Gene Humphries and his attorney, Mr. Stanley Sidicane, visited Stations KOLS and KKMA(FM) on January 8, 1972, and requested to inspect the public files. The operator on duty, Joe Swearingen, stated that he had never heard of such a file and, therefore, Messrs. Humphries and Sidicane were unable to inspect it. Mr. L. L. Gaffaney, who is the sole proprietor of Lakes, does not deny that the file was not made available. In fact, he states that if he had been present himself, he would have denied Humphries and Sidicane entry to the building. This reaction was due to harassment from Humphries, according to Gaffaney. Gaffaney further asserts that he considered obtaining a restraining order

against Humphries. Humphries is well known to this Commission, and we have denied an application for a construction permit for a new commercial FM broadcast station filed by a corporation controlled by him, *Vinita Broadcasting Co., Inc.*, 30 FCC 2d 448 (1971). Nonetheless, whatever Humphries' qualifications are to be a licensee of the Commission, and however he may be viewed by Gaffaney, Humphries has a right of access to the materials contained in the public inspection file. The public interest is clearly well served by keeping the files available so that the station's performance can be judged by *any* interested party. That public interest consideration is not altered by any animus that exists between Messrs. Gaffaney and Humphries.

10. Lakes generally asserts that the forfeiture is arbitrary, capricious, and extreme financial punishment for a small-market station. In determining the amount of a forfeiture, we consider several factors, including the number of rules violated, the seriousness and duration of the violations, and the financial condition of the station. We considered each of these factors in this case. In this regard, it should be noted that in the *Lakewood* case, above, the licensee was assessed a forfeiture of $2,000 solely for violations of Sections 73.1201(b) (1) and (3). In this case, there are additional violations, but a larger forfeiture was thought to be inappropriate in view of Lakes' financial position. We conclude, therefore, that when all factors are considered, the forfeiture assessed against Lakes is in keeping with other forfeiture actions and is not arbitrary or capricious. Nor can the forfeiture be considered an extreme financial punishment in view of the substantial profits generated by the combined operations of Stations KOLS and KKMA(FM).

11. Accordingly, IT IS ORDERED, That the application for mitigation or remission of forfeiture of $2,000, filed October 2, 1972, by Lakes Area Broadcasting Co., IS DENIED.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Lakes Area Broadcasting Co.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1092

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MARSH MEDIA, LTD., LICENSEE OF TELEVISION STATION KVII-TV, AMARILLO, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has under its consideration (1) its Notice of Apparent Liability issued on March 15, 1972, addressed to Marsh Media, Ltd. licensee of Television Station KVII-TV, Amarillo, Texas, and (2) a letter from the licensee written in response to the Notice of Apparent Liability received April 14, 1972.

2. The Notice of Apparent Liability for one thousand five hundred dollars ($1,500) was issued pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended, for apparent violation of (1) Section 317 of the Communications Act of 1934, as amended, and Section 73.654 of the Commission's Rules in failing to disclose the identity of the sponsors of certain commercial matter broadcast by KVII-TV, and (2) Section 73.670 of the Commission's Rules in failing to make the proper entries in the program log to reflect the identity of the sponsor of certain commercial matter broadcast by KVII-TV. The licensee participated in the promotion of a motorcycle show and shared in the profits from the show. It appeared that commercial announcements advertising the show were broadcast daily by KVII-TV between March 12 and April 4, 1971, but no announcement, either visual or aural, was made that the announcements were sponsored, furnished or paid for as required by Section 317 of the Act and Section 73.654 of the Rules. Further, the KVII-TV program logs for the period noted above contain no entries identifying the sponsor(s) or the person(s) who paid for the announcements advertising the motorcycle and sports show as required by 73.670 of the Commission's Rules.

3. The licensee's letter submitted by its attorney in response to the Notice of Apparent Liability did not deny the violations, but requested that the Commission defer further consideration of the Notice of Apparent Liability on the grounds that the Commission had not completed the inquiry which resulted in issuance of the Notice of Apparent Liability. The licensee based its contention on a request by the Commission's staff for additional information and the licensee's belief that because of the inquiry the Commission had deferred action on

Marsh Media's application for renewal of the license of KVII–TV. Since the staff made its request for more information after the Notice of Apparent Liability was issued, the licensee contended, the inquiry was not yet completed.

The licensee stated:

> It is recognized, of course, that under Section 503(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 503(b)(1), any "forfeiture shall be in addition to any other penalty provided" under the Communications Act. However, basic considerations of fairness dictate that the Commission complete its inquiry into the operation of the station before deciding upon any action that should be taken as a result of that inquiry.

By letter dated April 28, 1972, the licensee's attorney was informed that the Commission would proceed with consideration of the Notice of Apparent Liability as a separate matter and licensee was informed that any showing why the apparent liability should be reduced or remitted, received prior to the Commission's disposition of the Notice, would be presented to the Commission for its consideration in connection therewith. No further showings have been received.

4. We have considered the licensee's reply and the circumstances in this case, and we are convinced that it would not be unfair to the licensee to order the payment of the forfeiture contemplated by the Notice of Apparent Liability. The aspects of the investigation upon which the Notice of Apparent Liability was based are distinct from the other matters concerning which we have made inquiry, and treating them independently, we issued our Notice of Apparent Liability based on the facts we deemed ripe for action while holding in abeyance treatment of other matters which we might subsequently wish to consider. The matters held in abeyance have no bearing upon the licensee's liability for the violations set forth in the Notice issued on March 15, 1972, and the licensee was informed on April 28, 1972 that the violations cited in the Notice would be so treated and that if it desired to submit showings in remission or mitigation of the forfeiture, such a plea would be brought to the Commission's attenion when it next considered the forfeiture. The Notice of Apparent Liability affords the licensee an opportunity to submit within 30 days, a statement explaining the circumstances surrounding the alleged violations and why he should not be held liable or the forfeiture should be reduced in amount. *Three States Broadcasting Company* (WHJC), FCC 72–374, adopted April 26, 1972. The licensee has had ample time to submit a response to the violations charged in the Notice of Apparent Liability. Further, since the violations occurred every day from March 12 through April 4, 1971, we find all the violations to be repeated within one year of the date of issuance of the Notice of Apparent Liability.

5. In view of the foregoing, IT IS ORDERED, That Marsh Media, Ltd., licensee of Television Station KVII–TV, Amarillo, Texas FORFEIT to the United States the sum of one thousand five hundred dollars ($1,500) for repeated violations of Section 317 of the Communications Act of 1934, as amended, and Sections 73.654 and 73.670 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section

1.621 of the Commission's Rules, an application for mitigation or remission of the forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Marsh Media, Ltd., licensee of Television Station KVII–TV, Amarillo, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1095

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of an Application of NORRISTOWN DISTRIBUTION SYSTEMS, INC., NORRISTOWN, PA. For Certificate of Compliance Pursuant to Part 76, Subpart B of the Commission's Rules	CAC-215 (PA806) CSR-195

MEMORANDUM OPINION AND ORDER

(Adopted December 1, 1972; Released December 5, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON, DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. On April 20, 1972, Norristown Distribution Systems, Inc., applied for a certificate of compliance to begin cable television service in Norristown, Pennsylvania, a major television market (Philadelphia, Pennsylvania-Burlington, New Jersey, #4). The application has been opposed by Taft Broadcasting Company, licensee of Station WTAF-TV, Philadelphia, Pennsylvania, and by WHYY, Inc., licensee of Station WHYY-TV, Wilmington, Delaware, and WUHY-TV, Philadelphia, Pennsylvania, by "Complaint and Request For Special Relief."

2. Norristown intends to commence service with the following television signals:

KYW-TV (NBC, Channel 3), Philadelphia, Pennsylvania
WCAU-TV (CBS, Channel 10), Philadelphia, Pennsylvania
WPVI-TV (ABC, Channel 6), Philadelphia, Pennsylvania
WKBS-TV (Ind., Channel 48), Philadelphia, Pennsylvania; Burlington, New Jersey
WPHL-TV (Ind., Channel 17), Philadelphia, Pennsylvania
WTAF-TV (Ind., Channel 29), Philadelphia, Pennsylvania
WUHY-TV (Educ., Channel 35), Philadelphia, Pennsylvania
WHYY-TV (Educ., Channel 12), Wilmington, Delaware
WOR-TV (Ind., Channel 9), New York, New York
WNEW-TV (Ind., Channel 5), New York, New York
WNJU-TV (Ind.-Spanish Language, Channel 47), New York, New York; Newark, New Jersey
WNET (Educ., Channel 13), New York, New York

3. Taft Broadcasting objects to certification on the grounds that the franchise awarded Norristown on December 15, 1965, is inconsistent with Section 76.31(b) of the Rules because it provides for an annual "rental fee" of 6% of the gross annual receipts or $2,000 per year whichever sum is greater.

4. In its "Complaint and Request For Special Relief," WHYY, Inc., objects to the proposed carriage of WNET on the grounds that

(a) Norristown is included within the primary service areas of both of WHYY's stations and is a valuable viewer support area for them; (b) WHYY draws significant financial support from the Norristown area, and funds are received from the area's school districts through the Tri-State Instructional Broadcasting Council; (c) because WNET's program schedule duplicates a substantial portion of WHYY–TV's schedule, importation will inevitably erode local support for WHYY–TV and WUHY–TV among cable television subscribers for both instructional and public broadcast services; and (d) viewers in Norristown will not support the WHYY stations financially while paying subscription fees to a cable television system which imports duplicate signals from a distant station.

5. We deal with these objections as follows:

(a) In paragraph 115 of our *Reconsideration in Docket 18397*, 36 FCC 2d 326, we stated that:

> We are modifying the rule so that franchises granted prior to March 31, 1972, will be processed even though they do not meet all the requirements of our new rules so long as there is substantial compliance. For instance, the delay attendant to renegotiation of a franchise requiring a 6% franchise fee would do more of a disservice to the public we are trying to protect than the fee itself which will have, in any case, to be modified within five years.

Accordingly, while Norristown's franchise is not in complete compliance with our standards, we find that it is in substantial compliance within the meaning of paragraph 115 of the *Reconsideration*, *supra.*, *CATV of Rockford*, FCC 72–1005, —— FCC 2d ——.

(b) Section 76.61(d) of the rules permits carriage of distant out-of-state educational stations proposed in certification applications in the absence of opposition of local educational stations or authorities. The objections submitted herein, in the absence of rebuttal by the cable system, persuades us to deny carriage of WNET. We emphasize, however, that Section 76.61(d) does not require automatic denial of distant educational signal carriage in the face of local educational signal objection. Such objection must be supported by probative evidence.

In view of the foregoing, we find that, with the exception of carriage of WNET, a grant of Norristown Distribution System, Inc.'s application is consistent with the public interest.

Accordingly, IT IS ORDERED, That, the captioned application for certificate of compliance filed by Norristown Distribution Systems, Inc., IS GRANTED, to the extent indicated in paragraph 4 above and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That the "Complaint and Request For Special Relief" filed July 27, 1972, by WHYY, Inc., IS GRANTED to the extent indicated in paragraph 5 above and in all other respects, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection of Taft Broadcasting Company To Application For Certificate of Compliance," filed June 2, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NORTHEAST OKLAHOMA BROADCASTING, INC., VINITA, OKLA. Requests: Interim Authority To Operate Facilities of Former Station KVIN (1470 kHz, 500 w., Day)	File No. BPI–33

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1972; Released November 29, 1972)

1. The Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority, has before it for consideration the above request for joint interim authority to operate the facilities of KVIN, Vinita, Oklahoma, and opposition thereto by PBL Broadcasting Company.

2. Since April of this year, Northeast has been operating KVIN on a temporary basis following termination of a proceeding wherein the Commission denied the former operator's application for renewal of license. *Vinita Broadcasting Company, Inc., et al.*, 30 FCC 2d 458, 22 RR 2d 195 (1971), reconsideration denied, 32 FCC 2d 501, 23 RR 2d 262 (1971). Northeast's operation was initially authorized pursuant to section 309(f) of the Communications Act of 1934, as amended. This authority was subsequently extended for a second ninety days on July 19, 1972.[1] Upon expiration of the statutory authorization, the Commission granted Northeast a special temporary authorization (STA) for a period of thirty days in order to permit Commission consideration of its proposal for joint interim authority. On November 15, 1972, we denied Northeast's request for joint interim authority principally because PBL would have been required to reimburse Northeast for one-half of its capital investment in KVIN's equipment.[2] In denying the request, however, we expressed the hope that the parties could reach agreement on a joint operation in the future. At the same time, the two applications for permanent authority were designated for hearing.[3] Immediately thereafter, on November 16, 1972, Northeast filed a motion to stay the effect of the Commission's decision denying its request for interim authority. The following day the Commission granted the motion but only to the extent that it allowed KVIN to continue operation pending the filing of a motion for stay in the Court of

[1] *Green Country Broadcasting Co., Inc.*, FCC 72–636, released July 25, 1972, 36 FCC 2d 74.
[2] *Northeast Oklahoma Broadcasting, Inc.*, FCC 72–1019, released November 21, 1972, — FCC 2d —.
[3] *Northeast Oklahoma Broadcasting, Inc.*, FCC 72–1031, released November 21, 1972, — FCC 2d —.

Appeals.[4] As in the previous Order, we repeated our concern for the residents of Vinita and suggested that "the proper method of proceeding would involve the formation of a third entity by the applicants to operate the station, and the payment of a fair rental by that entity to Northeast," thus avoiding "the pitfalls inherent in * * * forced capital contribution * * *"[5]

3. In an apparent attempt to comply with our suggestions, Northeast, by letter dated November 20, 1972, modified its original proposal. Under the new version, a third entity would be formed to conduct the joint interim operation. Northeast and PBL each would choose two members of the Executive Board with the fifth member to be selected by the original four. If the four members cannot agree, then Northeast consents to having the fifth member selected by the National Association of Broadcasters. In the event the N.A.B. is not willing to act as the selector, Northeast suggests that the Commission designate someone to function in that capacity. The five-member board, in turn, is to choose the person or persons to manage the day-to-day operations of the station. The joint interim operator is to rent the KVIN facilities from Northeast for approximately $450.00 per month, a rate equivalent to two percent of the purchase price paid the former licensee by Northeast.

4. In opposition, PBL asks the Commission to dissolve its partial grant of Northeast's motion for stay and take KVIN off the air. PBL takes the position that the Commission's Order of November 15, 1972, denied Northeast's request for joint interim authority and that that decision was subsequently stayed for the sole purpose of affording Northeast time to seek relief in the Court of Appeals. PBL states that although it has pledged itself to seek a basis for joint interim operation, there is no proposal for joint operation presently before the Commission.

5. PBL is correct in its interpretation of our action of November 17 staying our Order of November 15th. The stated purpose of that action was merely to enable KVIN to remain on the air to permit Northeast time to seek a judicial stay. Nonetheless, as noted in paragraph 2, *supra*, the Commission also reiterated its hope that a suitable vehicle for joint interim operation could be devised, and we are thus disinclined to fault Northeast for using part of the ten-day grace period to modify its previously unacceptable position. In our opinion, Northeast's latest proposal (which we will consider as an amendment to its original request) succeeds in eliminating the features which we had previously found objectionable. Under the present proposal a third entity in which PBL will have an equal voice will control operations, the day-to-day management of KVIN will be selected by the five-member board of that entity, and PBL will not be compelled to make capital contributions for unwanted equipment or to accept the present management of KVIN. Although the proposal is in some respects short on details, we cannot understand PBL's reluctance to accept it in principle. PBL has stated throughout that it is interested in a joint operation provided it did not contain certain objectionable features. These

[4] *Northeast Oklahoma Broadcasting, Inc.*, FCC 72–1035, released November 21, 1972, — FCC 2d —.
[5] *Id.* at paragraph 7.

objections have now been obviated and PBL's opposition, based as it is on procedural grounds, appears inconsistent with its own expressed desire to preserve Vinita's only local broadcast service. Although Commission policy favors joint interim operation by competing applicants rather than operation by a single applicant, we cannot permit one competing applicant to exercise veto power over a service which we find to be in the public interest. Such a concession would run contrary to the Commission's basic mandate. Since we still hope that PBL will see its way clear to participate in the operation, our grant will remain open-ended for a period of thirty days to afford PBL the opportunity of joining the interim operation under the terms proposed. The grant, of course, will also be conditioned so that in the event PBL does not choose to participate, no comparative advantage will accrue to Northeast by virtue of its interim authorization.[6]

6. In view of the foregoing, IT IS ORDERED, That the request for joint interim authority to operating the facilities of station KVIN, filed by Northeast Oklahoma Broadcasting, Inc., IS GRANTED subject to the following conditions:

(a) That PBL Broadcasting Company shall be permitted to join in the interim operation under the terms heretofore noted within a period of thirty days from the release of this Order;

(b) That, in the event PBL Broadcasting Company does not join the interim operation, no comparative or other advantage will accrue to Northeast Oklahoma Broadcasting, Inc., by virtue of the interim operation;

(c) That the interim authority granted herein will be terminated if the conditions specified in (a), above, are not complied with; and

(d) That the interim operation authorized herein shall terminate upon grant of program test authority to the winning applicant in the forthcoming comparative hearing.

7. IT IS FURTHER ORDERED, That the Commission's previous Orders in this proceeding, adopted November 15 and 17, 1972, FCC 72–1019 and FCC 72–1035, respectively, ARE SET ASIDE to the extent indicated above but ARE AFFIRMED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
HAROLD L. KASSENS,
(For Wallace E. Johnson,
Chief, Broadcast Bureau).

[6] *Mineral King Broadcasters*, FCC 69–28, 15 FCC 2d 835.

F.C.C. 72–1049

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE OUTLET CO., SAN ANTONIO, TEX. For Renewal of License of Station KSAT–TV, San Antonio, Tex.	File No. BRCT–345

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released December 4, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS DISSENTING

1. The Commission has before it for consideration: (i) the above-captioned application for renewal of license for Station KSAT–TV, San Antonio, Texas; (ii) a petition to deny the application filed by the Bilingual, Bicultural Coalition on the Mass Media (petitioners); (iii) an opposition to the petition to deny filed by the licensee; (iv) a reply to the opposition filed by petitioners; and (v) various other pleadings.[1]

2. The Outlet Company timely filed its application for renewal of license for KSAT–TV on April 16, 1971. Thereafter, on June 30, 1971, the Bilingual, Bicultural Coalition on the Mass Media filed a petition to deny KSAT–TV's application on the grounds that the licensee had failed to: (i) ascertain properly the needs and interests of the Mexican-American community of San Antonio; (ii) provide programming designed to meet the needs and interests of the Mexican-American community; (iii) maintain employment practices which avoid discrimination against employees and applicants on the grounds of national origin, and (iv) provide unbiased and objective news coverage of the Mexican-American community of San Antonio.

3. Petitioners predicate their standing as parties in interest on the grounds that the Bilingual, Bicultural Coalition on the Mass Media is an unincorporated association of persons and organizations located within the City of San Antonio, Texas. The Coalition is composed of prominent leaders or organizations associated with the Mexican-American community of the city and includes members of the listening audience of Station KSAT–TV.

4. Licensee, in its opposition, states that some of the organizations listed by petitioners as being members of the Coalition are not members of the Coalition. Licensee states that this fact raises doubts as to the representations made by petitioners to the Commission. In addition, licensee states that on the basis of the information submitted by peti-

[1] These pleadings include an amendment to KSAT–TV's application for renewal of license; petitioners' "Motion to Strike the Supplement to the Application;" and licensee's Opposition to petitioners' "Motion to Strike." These pleadings are discussed in paragraph 8, *infra*.

tioners, one cannot "ascertain properly who the petitioners are and the degree of responsibility to afford them."

5. Petitioners, in their reply, state that since the Coalition is a newly formed umbrella group, the membership may fluctuate and that some of the members have withdrawn from the Coalition due to the fact that its activities "drew local publicity and resulting pressure from the dominant Anglo society of San Antonio." Petitioners also state that even if the petition were signed by a single individual, the petition would be sufficient since *Hale* v. *FCC* [2] held that a single viewer or resident of a station's market area has standing to bring a petition to deny.

6. Without entering into a lengthy discussion of petitioners' standing in this case, we are of the opinion that petitioners have standing sufficient to file their petition to deny against KSAT–TV. *Office of Communications of United Church of Christ* v. *FCC*, 359 F. 2d 994 (1966). Further, the record does not disclose that petitioners' misrepresented the membership of the Coalition to the Commission. Since the Coalition is a newly formed "umbrella group," which is composed of numerous groups and community leaders, an influx of new members and an outflow of existing members would not appear to be unusual.

7. Licensee also alleges that petitioners failed to attach supporting affidavits of a person or persons with personal knowledge of the facts alleged in their petition to deny as required by Section 1.580(i) of the rules. Licensee states, therefore, that the petition must be dismissed since it is procedurally defective, citing *Triangle Publications, Inc.*, 21 R.R. 2d 420 (1971). Examination of the petition shows, in fact, that supporting affidavits were not attached. Accordingly, the petition will be dismissed. We will, however, treat the petition as an informal objection pursuant to Section 1.587 of the rules.

8. On September 10, 1971, the licensee of KSAT–TV submitted an amendment to its application. This amendment included, among other things, the station's random sample of the general public which was omitted from the original application and the results of consultations with individual members of the Bilingual, Bicultural Coalition. These consultations were conducted after the petition had been filed. Petitioners then filed a "Motion to Strike the Supplement to the Application" on the grounds that the members of the Coalition should not have been contacted personally by the station once they had filed their petition to deny and that all communications should have been made through the Coalition's attorneys. Licensee, in its opposition to petitioners' "Motion to Strike," states that the amendment fully complies with Section 1.522 of the Commission's Rules.

9. Section 1.522 of our rules provides that any application may be amended as a matter of right prior to the adoption of an order designating the application for hearing as long as the appropriate number of copies are filed and a copy of the amendment is served on the petitioners. See *The Evening Star Broadcasting Co.*, 27 FCC 2d 315 (1971), *affirmed sub nom. Stone* v. *F.C.C.*, D.C. Cir., Case No. 71–1166, June 30, 1972. The amendment of September 10, 1971, complies fully with this rule. Furthermore, absent specific evidence of abuse, we see

[2] 425 F. 2d 556 (D.C. Cir. 1970).

no reason why a licensee should be prohibited from contacting petitioners for the purpose of eliciting information on community problems and interests even though they have filed a petition to deny with the Commission. Accordingly, the motion to strike will be denied.

SURVEY ALLEGATIONS

10. The guidelines regarding licensee's obligation to conduct a community survey are set out in our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Briefly stated, an applicant must first determine the composition of his community, then consult with community leaders regarding local needs and problems, conduct a random survey of the general public, and finally propose programming designed to meet a number of those needs of the community as ascertained.

11. The licensee of KSAT–TV conducted a community leaders and general public survey. Petitioners allege, however, that the licensee's ascertainment efforts in both instances are deficient. With respect to KSAT–TV's random sampling of the San Antonio community, petitioners allege that the survey is misleading and deceptive in that the station overemphasized the higher socio-economic levels of the San Antonio area. Petitioners further allege that those interviewed are in an average wage bracket in excess of $10,000 per year while the per capita income of San Antonio is $2,313 per year.

12. Licensee states that its random survey was based on Coles Directory, which identifies and places buying power information in zones based on census data, block canvassing, and real estate valuations into 101 different neighborhood trading zones. Each zone is rated either: A—highest wealth, B—medium-high, C—medium, D—medium-low and E—lowest. The phone numbers of 283 people were selected at random from the zones as follows:

Category	Total selected	Spanish surnames
A	75	7
B	68	16
C	43	4
D	44	19
E	52	33
Total	283	79

13. Licensee claims that although the station's renewal application cites 200 phone calls, the station actually completed 250 phone calls of which 69 or 27% were Spanish-surnamed. Licensee further states:

> **Of the 69 Spanish-surnamed persons contacted, 43 were from neighborhood zones rated medium-low and low income or approximately 62% of the Spanish-surnamed persons contacted fell within this category. Contrary to the Coalition's presumption, the station did not concentrate on talking with members of the public earning in excess of $10,000.**

As a result of these telephone interviews, the station listed 15 problem areas including urban problems, racism and unemployment.

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14. In their reply, petitioners assert that licensee's explanation of its random survey confirms the argument that the station overemphasized the higher levels of the San Antonio socio-economic area. Petitioners conclude that KSAT–TV's survey is biased to the rich, unrepresentative of the Spanish-surnamed community, and not an accurate survey of the needs and interests of the general public.

15. Our *Primer* requires that a broadcast applicant conduct a survey using a "random sample of members of the general public." (Question 13 (b)). With respect to the means to be employed, the *Primer* states:

> No set number or formula has been adopted. Community leaders from each significant group must be consulted. A sufficient number of members of the general public to assure a general random sample must be consulted. The number of consultations will vary of course with the size of the city in question and the number of distinct groups or organizations. (Question 14)

In the Report and Order adopting the *Primer* we stated, in paragraphs 40 and 41, that statistical accuracy was not required and that random sampling might be taken from such sources as city or telephone directories. We also noted that, "numerical superiority, by itself, does not automatically indicate a more representative selection of community leaders or the general public." The key to the random sample is whether the applicant has used a method which is designed to result in a generally random sampling. A highly sophisticated methodology is not required. An examination of licensee's random survey reveals that licensee contacted 250 members of the general public, that 27% of those contacted were Mexican-Americans and that as a result of this survey licensee listed fifteen (15) problem areas. We find licensee's method of selecting persons from zones based on census data, block canvassing and real estate valuations fully acceptable. We find nothing in the *Primer* which requires that racial groups within the community be represented in direct proportion to their population within the community or that diverse socio-economic groups be represented equally in a station's random survey. The method of selecting subjects for the random sampling is left to the discretion of the licensee so long as a good faith effort is made. In light of the above, we find that no substantial or material questions of fact which warrant exploration in hearing have been raised regarding this matter.

KSAT–TV'S SURVEY OF COMMUNITY LEADERS

16. Petitioners allege that KSAT–TV conducted its community leader survey improperly by grouping the 91 interviewees into 11 categories: drug abuse, narcotics control, minorities, law enforcement, education, illiteracy, urban renewal, underemployment and unemployment, health services and problems of the aged. Of the 14 Mexican-Americans interviewed in connection with the survey, nine were classified under minorities, one under health services, one under drug abuse and three under illiteracy. According to petitioners, the station would lead the Commission to believe that not one Mexican-American could be found to address himself to the problems of law enforcement while there are Mexican-American police officers, sheriff's, deputies,

lawyers and judges; that not a single Mexican-American could be found to speak on education while there are many Mexican-American teachers, school administrators and college professors in the community; and that no Mexican-Americans could be found to discuss unemployment while unemployment strikes the hardest at the Mexican-American community in San Antonio. Further, out of the 91 community leaders contacted, only 14 or approximately 15% were Mexican-Americans while Mexican-Americans constitute 48% of the population of San Antonio. Petitioners state:

> The station is the sole selector of the persons whom it consults: its power through selection and thus opportunity to abuse this power by discriminatory selection is great. To insure that the staff acts in a nondiscriminatory manner, the Commission must require that the Station's use of its power results in ascertainees who are racially mixed in proportion to the market area or that the Station explain this disparity.

Petitioners argue that an analogy can be drawn between a station's power in selecting ascertainees and cases involving jury selectors who are not required to use random selection but empowered with broad selection. Petitioners ask that the Commission apply the *Smith* v. *Texas* case, 111 U.S. 128 (1940) and similar cases where the Supreme Court required that the make-up of juries reflect the make-up of the jurisdiction. Petitioners also argue that KSAT–TV did not follow the requirements of the *Primer* in obtaining balanced sampling of community leaders. The answer to Question 13(a) of the *Primer* states:

> * * * Groups with the greatest problems may be the least organized and have the fewest recognized spokesmen. Therefore, additional efforts may be necessary to identify their leaders so as to better establish a dialogue with such groups and better ascertain their problems.

Petitioners allege that KSAT–TV should have made an effort to contact more Mexican-American community leaders and that scarcity of Mexican-Americans indicates that the station failed to follow the *Primer*.

17. Licensee states that petitioners' objection to KSAT–TV's grouping of ascertainees by categories is irrelevant and that the grouping was done for convenience of presentation. Licensee states that the renewal application specifically states that, "the names of persons consulted are arranged under the topic of their primary concern although some expressed opinions on more than one community problem." (Exhibit 3, KSAT–TV application.) Licensee further refers to another statement in the renewal application:

> In discussions with the spokesmen for minority groups it is apparent that their problems are in large measure the same problems which concern all San Antonians * * *. Therefore, these community problems outlined below relate to Black and Mexican-Americans as well as the Anglo community. The problem area designated as "MINORITIES" pertains to the particular needs of Blacks and Mexican-Americans as expressed by their leaders.

18. With respect to the Coalition, licensee states that the application for renewal was filed on April 16, 1971, and that the Coalition, by its own admission, did not come into existence until April 27, 1971. Once the licensee became aware of the existence of petitioners' organization, the station undertook additional efforts to open a dialogue with

this new group. During the period from August 2 through August 11, the members of the Coalition were contacted by a station representative and asked to express their views concerning significant community problems. According to licensee, the majority of those contacted were unwilling to discuss community problems and those that did raised issues which are being considered by the station. In conclusion, licensee states that it has met its obligation to pursue a diligent, positive, and continuing effort to discover and fulfill the tastes, needs and desires of its community as evidenced by its community survey and its additional efforts to open a dialogue with members of the Coalition.

19. We have carefully reviewed licensee's community leader survey and find that it complies fully with our requirements as set forth in the *Primer*. First, there is nothing which prohibits a broadcast applicant from classifying ascertainees into areas or fields of particular interest or expertise after the applicant has conducted his survey. The *Primer* requires that the applicant identify the community leaders consulted by name, position and/or organization of each. As long as the applicant ascertains community problems from those leaders consulted, the applicant may present this material in any manner so long as the leaders are identified. According to the licensee, ascertainees were classified for convenience of presentation and were listed under their primary area of concern although some expressed numerous community problems. We find nothing objectionable in this practice. Secondly, with respect to petitioners' argument that Mexican-Americans were not consulted concerning numerous community problems, the *Primer* does not require that ascertainees be consulted concerning specific pre-determined community problems but rather that they be consulted to "ascertain what the person consulted believes to be the problems of the community from the standpoint of a leader of the particular group or organization." Accordingly, KSAT–TV contacted 14 Mexican-Americans and grouped them under the categories of minorities, health services, illiteracy, and drug abuse in its community survey. In addition, upon learning of the existence of the Coalition, licensee contacted members of the Coalition, attempted to ascertain their views concerning community problems and submitted the results of these interviews as an amendment to the station's application for renewal of license. Petitioners, however, were largely unresponsive to the station's efforts in this area. Thus, it appears that KSAT–TV made a good faith effort to consult with community leaders, including those of the Mexican-American community. Finally, with respect to the question of the numerical sufficiency of Mexican-American leaders interviewed, we find that mere numbers are not the controlling factor. Rather, the critical question as pointed out by the Commission in the *Report and Order* adopting the *Primer*, "should be generally one of representativeness, not one of specific numbers". See 27 FCC 2d at 668. We are not persuaded that KSAT–TV's consultations with San Antonio's Mexican-American leadership constitute an unrepresentative or inadequate sampling of that particular community group. In sum, we find that KSAT–TV has complied with the requirements of the *Primer* in ascertaining the needs and problems of San Antonio.

KSAT–TV'S PAST PROGRAMMING

20. Petitioners allege that KSAT–TV's past programming failed to serve the public interest, convenience, and necessity as required by the Communications Act of 1934, as amended. Petitioners allege that the station has repeatedly presented a one-sided picture of Mexican-Americans in its newscasts by reporting crime in the Mexican-American community while ignoring events of artistic, cultural or educational natures; that the station rarely, if ever, presents programs which expose Mexican-American children to Mexican-American culture and heritage; and that it ignores Mexican-American religious events and ceremonies or covers artistic events involving Mexican-American youth in an insubstantial manner. Petitioners further allege that the station is "selective in its coverage and reporting of events concerning Mexican-Americans, leaving the community generally uninformed as to the divergence of views, opinions and styles in the Mexican-American community." In addition, petitioners allege that KSAT–TV has presented distorted, biased and deceptive news programming pertaining to the affairs of Mexican-Americans. Specifically, petitioners allege the following examples of bias on the part of the licensee:

(a) The station aired a newscast announcing that a police officer had been injured in a fight in San Antonio on or about October 3, 1970. In its coverage of the event, KSAT–TV ignored that two members of a Mexican-American family had been severely beaten by police and one had been shot to death. The station overplayed the extent of the policeman's injuries by focusing the camera on a pool of blood in the street which was, in fact, the blood of the beaten Mexican-Americans and not that of the policeman.

(b) In September of 1970 the station failed or refused to cover a week-long celebration by the Mexican-American community of Mexican Independence Day. Members of the Mexican-American community personally visited the station before and during the celebration to inform its personnel of the event and request coverage.

21. Licensee states that KSAT–TV broadcasts daily a 6:00 p.m. and 10:00 p.m. half-hour newscast and a one hour locally produced public affairs program similar in format to the NBC "Today" program; that the station maintains a fulltime staff of 15 and a part-time staff of three (3), all concerned with the preparation of the station's newscasts; and that the news department attempts to cover all news events and present the material exactly the way it happens. Licensee further states that KSAT–TV covers news events without regard to the side of town in which they occur or the identity of the people involved and that stories involving Mexican-Americans in favorable situations are continually broadcast by the station. Licensee states the following:

A review of newscast scripts kept on file at the station would reveal that KSAT–TV continually presents social, cultural, artistic or educational stories involving Mexican-Americans. The news staff of KSAT–TV is continually urged, as a matter of station policy, to be on the lookout for news events which reflect favorably upon the local Mexican-American population. Representatives of the Coalition examined station news scripts for the period of September through December, 1970, the months of January and March 1971 and April 1 to 7, 1971. In addition, the Coalition monitored broadcasts from May 26 through June 2, 1971. It is interesting to note that their review produced only one purported allegation of a false, deceptive or biased news story on October 4, 1970.

With respect to the specific charges of news bias alleged by petitioners, licensee states the following:

(a) A review of the news script and film concerning the death of a Mexican-American on October 3, 1970, discloses that the Coalition erred in its criticism of KSAT–TV's coverage of the incident. The script states that a Mexican-American had been shot to death and that police grappled and scuffled with a Mexican-American. It was not reported that a policeman was severely beaten as alleged by the Coalition.

(b) Regarding Mexican Independence Day, KSAT–TV records do not indicate that any representative of the Coalition visited the station or otherwise contacted the station concerning coverage of the event. However, the station on its own, scheduled and broadcast considerable coverages of the event. In addition, the station filmed an entire ceremony featuring the Mexican Secretary of Commerce and provided the film to the local Spanish language station without charge. The station also covered a flag raising ceremony on September 13 celebrating Mexican-American Friendship Week and an evening parade in downtown San Antonio.

22. In addition to denying that its news coverage is biased, licensee lists the following programs as being responsive to the needs and interests of the Mexican-American community of San Antonio:

(a) "Contact 12"—a five minute segment during the 6:00 p.m. News which provides a "sounding board" for problems facing the public at large. An examination of Exhibit G, submitted by licensee, discloses that a substantial number of Mexican-Americans expressed views on this program.

(b) Public Service Spot Announcements—KSAT–TV uses numerous spot announcements to meet local needs. The station's Community Service Director appears personally on video taped spot announcements which she has researched and written. Many of these announcements are of special interest to Mexican-Americans.

(c) "Meet the Candidate"—free candidate announcements presented during election time. In the May 1970 primary elections, 6 Spanish-surnamed candidates accepted time, in the November 1970 general elections, 2 Spanish-surnamed candidates accepted time and in the April city elections, 28 Spanish-surnamed candidates accepted time.

(d) "Seven"—a daily one hour public affairs program during which numerous Mexican-Americans were interviewed concerning topics of interest to Mexican-Americans. Among those listed by the station are the following:

JANIE LOPEZ—Executive Director, United Businessmen of San Antonio—Loan program for potential businesses on the West Side.

RICARDO GOMEZ of Uvalde—in response to an alleged slur on the patriotism of Mexican-Americans.

LAURO MONTALBO, JR.—Director of the Bi-Lingual and Bi-Cultural programs for the South San Antonio School District.

VICENTE JIMINEZ—Chairman, White House Inter-Agency Committee on Mexican-American Affairs.

ELIZABETH ORTEZ—Social Worker with Senior Opportunity Services, Anti-Poverty Agency.

RAMON RODRIGUEZ—regarding the contribution of the Rodriguez family and other Mexican-Americans to the Texas cause during the Revolution of 1836.

(e) "Opinion"—a weekly public affairs show broadcast in cooperation with MALDEF, Mexican-American Legal Defense Fund, FAMA, Federation for the Advancement of Mexican-Americans, IMAGE, Involvement of Mexican-Americans in Gainful Endeavors, and SASH, San Antonio Self Help. Some of the topics discussed in this program were, "General Exploration of IMAGE Functions," "Mexican-American Legal Defense Fund," "Charges of Discrimination to Mexican-American Employees in the Civil Service Section at Kelly AFB, Texas," and "Mexican-Americans and Administration of Justice in the Southwest."

(f) "Classroom"—broadcast Monday through Friday in cooperation with the San Antonio Literacy Council. The program provides instruction in basic English as well as math, science, literature and social studies. KSAT–TV pays for the costs of taping and broadcasting the program.

(g) "Community Chapel"—religious programming including a Spanish language Mass.

In conclusion, the licensee claims that the "preceding paragraphs and renewal application clearly illustrate the positive and diligent manner in which KSAT–TV has met its public interest obligations in providing constructive worthwhile programming for the Mexican-American community in San Antonio."

23. Petitioners, in reply, state that licensee failed to refute the basic thrust of petitioners' charges that KSAT–TV presents a distorted picture of the Mexican-American community; that the station exercises a benevolent neutrality against the Mexican-American; and that interviews and public affairs programming cannot balance out the station's distorted and biased news coverage of the Mexican-American community. Petitioners further state:

> **The Station's complete recitation of its programming aimed at the Mexican-American half of its constituency is important for what it fails to say. Police brutality is a large issue in San Antonio and the "blood and guts" anti-Mexican-American format serves to justify police practices which "keep the Mexican-American in line." The Station's Opposition does not state that it conducted a documentary on the underlying causes of crime, the *barrio* viewpoint on crime and police, or on police brutality. One must conclude that the station has not made these efforts.**

24. With respect to the question of biased and distorted news coverage of the Mexican-American community, it is well established that the Commission will not conduct inquiries regarding a licensee's news presentation unless there is extrinsic evidence of deliberate distortion, bias or staging the news. *Letter to ABC, et al.*, 16 FCC 2d 650 (1969); *Hunger in America*, 20 FCC 2d 193 (1969). The extrinsic evidence, referred to above, consists of testimony, oral or written, from "insiders" or others who have direct personal knowledge of an intentional attempt to distort, stage or slant the news. *Letter to Mrs. Paul*, 26 FCC 2d 591 (1969). In the absence of such extrinsic evidence the Commission will not intervene since the Commission will not judge the truth of a particular news event or events. In the case before us, petitioners have not submitted extrinsic evidence to prove that KSAT–TV deliberately slanted or distorted its news coverage of the Mexican-American community. Neither have petitioners submitted sufficient evidence to show a pattern of bias, distortion or "benevolent neutrality" by KSAT–TV in its news coverage. Moreover, licensee has rebutted, effectively, petitioners' two examples of news bias. In the absence of further information, we are unable, at this time, to conclude that KSAT–TV has practiced distortion or otherwise slanted its news coverage with respect to Mexican-Americans.

25. Having decided that petitioners have not submitted sufficient information to show that licensee slanted or distorted its news coverage, we turn now to petitioners' allegation that KSAT–TV ignored the needs and interests of the Mexican-American community in its overall programming during the past license period. In our *1960 Programming Policy Statement*[3] we stated that the broadcaster should consider the tastes, needs and desires of the public in developing his programming, and should exercise conscientious efforts not only to ascertain them but, also, to carry them out as well as he reasonably can. We

[3] *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 20 R.R. 1901 (1960).

are convinced, after a careful review of KSAT–TV's application for renewal of license and pleadings, that the station has made a good faith effort to meet its programming obligations. Contrary to petitioners' assertions, it appears that KSAT–TV has provided meaningful programming designed to cover the needs and interests of the Mexican-American community. Through the broadcast of programs such as "Contact 12" – "Seven" and "Opinion", the station appears to have made an attempt to present the special problems facing the Mexican-Americans as well as the contributions which they have made to the culture, history, and economy of San Antonio. Petitioners do not dispute the fact that KSAT–TV has presented programming designed to meet the needs and interests of the Mexican-Americans. Petitioners do, however, challenge the types of programs which licensee has employed to meet these needs. Broadcast licensees are given wide discretion in choosing programming to meet this obligation. We find nothing in the information before us which indicates that KSAT–TV abused this discretion in its choice of program matter. Further, the mere fact that petitioners may disagree with KSAT–TV's programming does not, by itself, constitute an issue which must be resolved in a hearing. *WKBN Broadcasting Corporation*, 30 FCC 2d 958 (1971).

KSAT–TV'S EMPLOYMENT PRACTICES

26. Petitioners allege that KSAT–TV has failed to eliminate discrimination in employment and failed to establish a program to assure equal employment opportunities. According to petitioners, although licensee states that it has taken steps to comply with the Commission's equal employment opportunities requirements, the results of the station's program demonstrate a clear pattern of discriminatory practices. For example, in its latest employment report, the station lists 17 officials and managers and only one male and no female is a Mexican-American; the station lists 22 professionals of which 2 are Mexican-American males but none are Mexican-American females; and of the 14 people listed as office and clerical help, none are Mexican-Americans. Petitioners conclude:

> It follows therefrom that where the employment records of a station show that it has Mexican-American employees only at entry levels of employment, the station is *prima facie* guilty "patronismo"; i.e., employment discrimination on the grounds of national origin by relegating the Mexican-Americans to servile positions as second class citizens while the anglo carries "the white man's burden" as the ruling class. The burden must lie with the station to rebut this *prima facie* case.

27. Licensee, in opposition, claims that KSAT–TV has undertaken a positive and successful program to insure nondiscriminatory hiring practices. Licensee states that petitioners have failed to prove that the station practices discrimination in its employment policy and that an examination of KSAT employment records refutes this general and unsupported allegation. Licensee further states that from 1968 to the present, the station increased its Mexican-American Staff from 5 to 14 for a total of 9 additional Mexican-Americans; that during this same time the staff of KSAT–TV increased from 80 to 86 people, and that the increase in Mexican-Americans was more rapid than the increase of the total staff. In addition, in 1969 the KSAT–TV staff was reduced

by 4 while the total number of Mexican-Americans on the staff increased by 4. With respect to petitioners' analysis of the station's employment report, licensee alleges that:

> The employment report of KSAT–TV contradicts the conclusions of the Coalition in that of 17 employees classified as official and managerial, 14 are male while 3 are female, and of this category, 1 male is of Spanish-surname; of the 22 professionals, 2 males and 1 female are Spanish-surname; of 17 male technicians, 6 are Spanish-surnamed; of 3 male sales workers, 1 is Spanish-surnamed; of 14 office and clerical females, 2 are Spanish-surnamed for a total of 10 males, 3 females Spanish-surnamed Americans employed fulltime at KSAT–TV. On a part-time basis under office and clerical, one male Spanish-surnamed is employed out of a total of 2 such part-time employees.

Licensee also submits 15 case histories of Mexican-Americans who have applied for jobs or promotions at KSAT–TV and, according to licensee, these case histories "clearly indicate the positive and active role KSAT–TV has taken in implementing its nondiscriminatory employment practices." In addition, licensee states that in its July meeting with petitioners, the station announced that it would accept recommendations from petitioners for two on-camera employees, a sportscaster and a weather announcer. However, licensee has not received recommendations from petitioners concerning these vacancies. In conclusion, licensee claims that petitioners have not alleged that any person has been denied employment at KSAT–TV because of race and that KSAT–TV has consistently pursued an affirmative policy in according equal employment opportunities.

28. Section 73.680 of our rules provides that equal employment opportunities shall be afforded by broadcast licensees to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex. In addition, the rules require that licensees "establish, maintain and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practices." An examination of Section VI of KSAT–TV's renewal application, the station's equal employment opportunity program, discloses that KSAT–TV has adopted a program of equal employment opportunities and nondiscrimination in recruiting, hiring, placement and promotion. According to licensee, schools and colleges with significant minority enrollments are advised of careers in broadcasting and specific openings at KSAT–TV; leaders of minority and human relations groups, including IMAGE and MALDEF, are contacted and encouraged to refer qualified minority applicants when openings occur and the staff was instructed that all hiring and promoting must be done without discrimination. In addition, minority employees are given equal opportunities for positions and are encouraged to qualify themselves for advancement. The case histories, submitted by licensee, demonstrate that KSAT–TV, during the past license period, has attempted to recruit, hire and place minority group members in full compliance with Section 73.651.[4]

[4] Included in these case histories are instances in which Mexican-Americans were specifically recruited and trained for such positions as weather girl, salesman, and engineer. In a number of cases, an employee's work schedule was co-ordinated with his college work. In one reported instance a Mexican-American was selected for promotion over 18 fellow employees.

29. Further, as we stated in *The Evening Star Broadcasting Company* (WMAL–TV), 27 FCC 2d 240 (1971), *affirmed sub nom., Chuck Stone* v. *Federal Communications Commission*, D.C. Cir., Case No. 71–1166 (June 30, 1972), rehearing denied, September 1, 1972, simply indicating the number of minorities employed by a licensee, without citing specific instances of discrimination or a conscious policy of exclusion, is insufficient to warrant designating a license renewal application for evidentiary hearing. There is no showing of specific instances of discrimination or a conscious policy of exclusion in this proceeding which would require an evidentiary exploration into the licensee's employment practices.

30. Moreover, while an extremely low rate of minority employment may raise questions requiring appropriate administrative inquiry, *Chuck Stone* v. *Federal Communications Commission*, *supra*, such is not the case in this proceeding. The facts herein disclose that the number of minorities employed by KSAT–TV fall within a range of reasonableness when considered in conjunction with the number of minorities in the San Antonio standard metropolitan statistical area, which is comprised of 44 per cent Spanish-surnamed Americans and eight per cent Negro and other minorities. That is, a review of KSAT–TV's annual statistical profile reports (FCC Form 395) reveals that in 1971 the station had 76 fulltime employees of whom 13 were Spanish-surnamed and 2 were Black. A review of KSAT–TV's 1972 report reveals that KSAT–TV has 80 fulltime employees of whom 15 are Spanish-surnamed and 2 are Black. Thus, in 1971 minorities represented 19.2 per cent of KSAT–TV's total workforce and in 1972 minorities represented 21.25 per cent of KSAT–TV's total workforce. It is also noteworthy that in both 1971 and 1972 KSAT–TV's minority employees occupied positions other than those normally classified as menial.

31. On the basis of the foregoing, we conclude that petitioners have failed to raise a substantial and material question of fact regarding KSAT–TV's employment policies and practices which would require exploration in an evidentiary hearing.

CONCLUSIONS

32. Section 309(d) of the Communications Act provides for granting renewal applications where the Commission finds, after full consideration of all pleadings, that there are no substantial and material questions of fact that a grant of the applications would be consistent with the public interest. Section 309(d) also provides that where a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Where the Commission finds that such a showing has not been made, it may deny the petition. Accordingly, based upon our review of KSAT–TV's renewal application and all the pleadings filed in this proceeding, we find that petitioners have failed to raise substantial and material questions of fact which establish a *prima facie* case for denial of KSAT–TV's license. We also find that a grant of the license renewal application for KSAT–TV would serve the public interest, convenience and necessity.

33. In reaching our conclusions, we are not unaware of the concern being expressed by minority groups about the responsiveness of the broadcast media to their local problems. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section 309(d) of the Act to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that community groups are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions *throughout the license term.* Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested members of the public who feel a station's performance is inadequate should so advise the broadcaster to give him the opportunity to consider their ideas and suggestions. Such discussions will be more effective if conducted throughout the license term and not only at renewal time.

34. In view of the foregoing and upon review of The Outlet Company's renewal application for KSAT–TV, we conclude that The Outlet Company is legally, technically, financially and otherwise qualified to remain a licensee and that a grant of its renewal application would serve the public interest, convenience and necessity.

35. Thus, IT IS ORDERED, That the "Petition to Deny" the license renewal application of The Outlet Company for Station KSAT–TV, IS DISMISSED and when considered as an informal objection IS DENIED.

36. IT IS FURTHER ORDERED, That the license renewal application of The Outlet Company for Station KSAT–TV IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1085

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLATTE VALLEY FARM SUPPLY CO., D.B.A. TRANSLATOR TV, INC., UNINCORPORATED AREA SOUTHWEST OF ESTES PARK, COLO.	File No. BPTTV-4567
PLATTE VALLEY FARM SUPPLY CO., D.B.A. TRANSLATOR TV, INC., UNINCORPORATED AREA SOUTHWEST OF ESTES PARK, COLO.	File No. BPTTV-4568
PLATTE VALLEY FARM SUPPLY CO., D.B.A. TRANSLATOR TV, INC., UNINCORPORATED AREA SOUTHWEST OF ESTES PARK, COLO.	File No. BPTTV-4569
PLATTE VALLEY FARM SUPPLY CO., D.B.A. TRANSLATOR TV, INC., UNINCORPORATED AREA SOUTHWEST OF ESTES PARK, COLO.	File No. BPTTV-4570
For Construction Permits for New Television Translator Stations	

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION:

1. The Commission has before it the above-captioned applications of Platte Valley Farm Supply Company, doing business as Translator TV, Inc., requesting construction permits for new one-watt VHF television broadcast translator stations to serve the unincorporated area southwest of Estes Park, Colorado, as follows: BPTTV-4567, to rebroadcast station KWGN-TV, channel 2, Denver, Colorado, on output channel 3, via K63AB, Estes Park, Colorado; BPTTV-4568, to rebroadcast station KOA-TV, channel 4, Denver, Colorado, on output channel 8, via K65AA, Estes Park, Colorado; BPTTV-4569, to rebroadcast station KMGN-TV, channel 7, Denver, Colorado, on output channel 10, via K59AA, Estes Park, Colorado; and BPTTV-4570, to rebroadcast station KBTV, channel 9, Denver, Colorado, on output channel 12, via K61AA, Estes Park, Colorado. The Commission also has before it for consideration a petition to deny, filed August 24, 1972, by Estes Park CATV, Inc., doing business as Cablevision of Estes, owner and operator of a cable television system in Estes Park, Colorado, and an opposition to the petition to deny filed October 3, 1972, by the applicant. No other pleadings have been filed.

2. Petitioner claims standing as a "party in interest" within the meaning of section 309(d) of the Communications Act of 1934, as amended, on the grounds that electrical interference will be caused to petitioner's cable television system by operation of the proposed translator stations. We find that petitioner has standing. *National Broad-*

casting Co., Inc. v. *Federal Communications Commission*, 76 U.S. App. D.C. 238, 132 F 2d. 545, affirmed 319 U.S. 239, 63 S. Ct. 1035.

3. Petitioner alleges that it serves approximately 150 homes in the area which would be served by the translators. The following signals are carried on petitioner's system:

Cable Channel	
2	KWGN–TV, channel 2, Denver, Colorado.
3	Local originations and weather.
4	KOA–TV, channel 4, Denver, Colorado.
5	KFBC–TV, channel 5, Cheyenne, Wyoming.
6	KRMA, channel *6, Denver, Colorado.
7	KMGH–TV, channel 7, Denver, Colorado.
8	Unused.
9	KBTV, channel 9, Denver, Colorado.
10	KHBC–TV, channel 20, Denver, Colorado.
11	Occasional use for tourist information.
12	KTOV–TV, channel 31, Denver, Colorado.
13	Television station, channel 22, Fort Collins, Colorado.

Stations KHBC–TV, channel 20, and KTOV–TV, channel 31, Denver, Colorado, have not commenced operations and the television station to operate on channel 22, Fort Collins, Colorado, has not yet begun construction (no call sign has been assigned).

4. The petition to deny is totally devoid of any factual support for petitioner's claim that operation of translator stations on output channels 8, 10 and 12 will cause electrical interference. The statement of petitioner's technician, which is the only part of the petition supported by an affidavit, makes no mention whatever of these applications except the bare conclusion that ". . . these too would restrict the future growth of Cablevision, reducing the possibility of added channels in the future." The applications will be granted.

5. The sole support for the allegation that operation of the channel 3 translator (BPTTV–4567) will cause interference is a statement by the technician that:

> "The proposed translator with an effective radiated power of 5.2 watts on channel 3 would deliver enough microvolts to the 300 ohm line from the set to the matching transformer for the 75 ohm line to significantly degrade CATV's local channel 3, producing a constant co-channel beat."

The paucity of supporting technical data leaves us unconvinced of the likelihood of interference. ". . . the Commission is entitled to insist upon more than conclusional allegations easily made and which, if accepted, entail unjustified delay and consumption of the Commission's time and energy." *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission*, 126 U.S. App. D.C. 123, 375 F 2d. 8 RR 2d 2089. It is also obvious that, if petitioner is interested in protecting the integrity of its cable system, it has numerous means available to it. For example, it could use unused cable channels 8 and 11 for its local originations or it could employ devices, mentioned by the applicant, to prevent interference. We also point out that petitioner is attempting to reserve presently unused cable channels 10, 12 and 13 for carriage, at some unknown future date, of yet unbuilt television stations. We cannot protect petitioner against a speculative injury *in futuro*. *Oregon Broadcasting Company*, 18 FCC 2d 612, 16 RR 2d 878. In view of petitioner's failure to furnish the barest minimum of sup-

port for its allegations, it is not entitled to a hearing. *Westminster Broadcasting Corporation* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 459 F. 2d 1356, 23 RR 2d 2106.

6. We find that no substantial or material questions of fact have been raised by the pleadings. We further find that the applicant is qualified to construct, own and operate the proposed new translator stations and that grant of the applications would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed herein by Estes Park CATV, Inc., doing business as Cablevision of Estes, IS DENIED, and the above-captioned applications of Platte Valley Farm Supply Company, doing business as Translator TV, Inc., ARE GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72–1074

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 81 AND 83 OF THE COMMISSION'S RULES TO PROVIDE FOR A CLASS II PUBLIC COAST STATION IN THE VICINITY OF PONCE, P.R.	Docket No. 19361 RM–1780

REPORT AND ORDER

(Adopted November 29, 1972; Released December 5, 1972)

BY THE COMMISSION:

1. A Notice of Proposed Rule Making in the above captioned matter was adopted on December 8, 1971, and was published in the Federal Register on December 17, 1971 (36 FR 24008). As a result of comments filed by the Interdepartment Radio Advisory Committee (IRAC), a Further Notice of Proposed Rule Making in this matter was adopted on September 20, 1972, and published in the Federal Register on October 3, 1972 (36 FR 20729). The dates for filing comments and reply comments have passed.

2. The Notice of Proposed Rule Making was issued in response to a petition (RM 1780) filed by Ponce Marine Services, Inc., which requested that a pair of frequencies be made available for assignment for public ship-shore communications in the vicinity of Ponce, Puerto Rico. In that Notice, we proposed to amend Parts 81 and 83 of our rules to provide for a pair of frequencies in the 2 MHz band for a Class II Public Coast Station in the vicinity of Ponce, Puerto Rico. In order to minimize interference to presently authorized stations, the frequencies 2582 kHz and 2198 kHz were selected.

3. Comments submitted by IRAC indicated that the use of this pair of frequencies by a Class II Public Coast Station in Ponce, Puerto Rico could cause harmful interference to government stations presently operating on these frequencies in the Puerto Rico area. As a result of the IRAC comments, a substitute pair of frequencies was proposed by the Commission in a Further Notice of Proposed Rule Making. In place of the above mentioned frequencies, the frequency 2086 kHz (for use by ship stations) and the frequency 2585 kHz (for use by the coast station) were selected for assignment for public ship to shore communications in the vicinity of Ponce, Puerto Rico. In order to further minimize the possibility of harmful interference, certain technical limitations on emission and power were also incorporated in the proposed amendments.

4. Comments were filed by Ponce Marine Services, Inc. and Luis A. Ayala Colon, Sucrs., Inc. Both parties fully supported the proposal as set forth in the Appendix to our Further Notice of Proposed Rule Making and urged its adoption.

5. The Commission believes that the rule amendments will provide for more effective utilization of maritime frequencies in that it will make a pair of 2 MHz frequencies available for direct communications in an area which is not now adequately served under the present frequency assignment plan.

6. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Section 4(i) and 303 (f) and (r) of the Communications Act of 1934, as amended, Parts 81 and 83 of the Commission's rules ARE AMENDED as set forth in the attached Appendix. Since the service herein authorized is urgently needed in the interest of safety of life at sea in the vicinity of Ponce, Puerto Rico, the effective date provisions of the Administrative Procedure Act, 5 USC 533 do not apply. Accordingly, IT IS FURTHER ORDERED, That these rule amendments will be effective December 12, 1972.

7. IT IS FURTHER ORDERED, That the proceeding in Docket 19361 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. The table in Section 81.304(a) is amended by adding the frequency 2585 kHz after 2582 kHz to read as follows:

§ 81.304 Frequencies Available.

(a) * * *

Carrier frequency (kHz)		See section	Conditions of use	
* * *		* * *	* * *	
* * *	2585	81.306(b)	* * *	21
		* * *		

2. The Table in § 81.306(b) is amended by the addition of the following new location and frequencies after the entry for Corpus Christi, Texas.

§ 81.306 Frequencies Available Below 27.5 MHz.

* * * * * * *

(b) * * *

Ponce, P.R.	2585	None	2086	None	

3. In Section 83.351, the table in Paragraph (a) is amended with regard to frequency 2086.0 kHz, and Paragraph (b)(20) and (21) is amended to read as follows:

§ 83.351 Frequencies Available.

(a) * * *

* * *		* * *	* * *
* * *	2086.0	83.354	3, 20, 21, 25
		* * *	* * *

(b) * * *
(20) Available in accordance with the provisions of § 83.354(b).
(21) Available in accordance with the provisions of § 83.354(c).

* * * * * * *

4. The Table in § 83.354(b) is amended by the addition of the following new location and frequencies after the entry for Corpus Christi, Texas.

§ 83.354 Frequencies below 5000 kHz for public correspondence.

* * * * * * *

(b) * * *

Ponce, P.R.	2086	None	2585	None	

* * * * * * *

109-019—72——11

F.C.C 72-973

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HARVEY MICHELMAN, CONSERVATIVE PARTY
CANDIDATE FOR CONGRESS
Concerning Section 315 Political Broadcast Re Station WNBC–TV

NOVEMBER 1, 1972.

MR. HARVEY MICHELMAN,
2291 Broadway
New York, N.Y.

Reur request for Commission review of Broadcast Bureau ruling regarding your complaint against WNBC–TV. It appears that Bureau advised you that program in question, Newslight, appeared to be bona fide news interview program exempt from equal opportunities provision of section 315 and that before Commission could take action regarding complaint you must furnish basis for your contention that Newslight is not exempt news interview program. Bureau further advised you that upon receipt of such information further consideration would be given to your complaint. In telephone call to Commission you also raised Fairness Doctrine questions regarding WNBC–TV coverage of your campaign. The Bureau has been inquiring into this aspect of your complaint and information from NBC did not reach Commission until Wednesday, November 1, 1972. In view of these circumstances, we shall consider your entire complaint at this time.

The following recitation of facts appears pertinent. You are Conservative Party candidate for Congress in New York's 20th Congressional District. Two of your opponents, Mrs. William F. Ryan (Liberal Party) and Mrs. Bella Abzug (Democratic Party) appeared on WNBC–TV program Newslight on October 15 and 22, 1972 respectively. In telegram to Commission received October 23, 1972 you stated that you have been denied equal time by NBC as result of such appearances. On October 24, 1972 a member of Commission's staff called your office, spoke to Mr. Richard Heller and explained equal opportunities provision of section 315 and exemptions of bona fide news interview program therefrom. Since NBC has responded orally to Commission inquiry by stating that Newslight was a regularly scheduled bona fide news interview program and as such exempt from the equal opportunities requirement of section 315, Mr. Heller was advised during the October 24 telephone conversation that the complainant should set forth the basis for his allegations that the program was not exempt. Mr. Heller then stated he would contact Commission further. Commission next received a telegram on October 27, 1972 in

which you challenged designation of Newslight as a bona fide news interview program but furnished no basis for such challenge. Broadcast Bureau then sent telegram to you on October 27, 1972 in which you were advised that NBC had stated that Newslight was "same program as Searchlight under different title and that Commission had ruled Searchlight was bona fide news interview program (see *Socialist Workers Party*, 40 FCC 322 (1961)); and that, therefore, before Commission can take action you must furnish basis for your contention that Newslight is not exempt news interview program."

However, before you received the telegram you called the Commission and discussed your complaint further. Although you furnished no further information regarding the bona fides of Newslight as an exempt program, you stated that WNBC–TV had presented a total of only two minutes of news coverage of your campaign, while Mrs. Ryan and Mrs. Abzug each had received approximately 20 minutes of coverage plus their one-half hour appearances on Newslight. The Fairness Doctrine was explained to you and you were advised that consideration of the station's coverage should also include the scheduled appearances of you and your opponents on WNBC–TV's November 5 edition of "Direct Line." Since you did not know the length of "Direct Line" and raised Fairness Doctrine questions, you were advised that NBC would be asked for further information regarding "Direct Line" and its overall coverage of the competing candidates, and that thereafter a response would be given to your telegram of October 27, 1972.

With respect to Fairness Doctrine aspect of your complaint, NBC in letter of November 1, 1972, submitted further information regarding its coverage of the candidates of the 20th District. It stated that Mrs. Abzug and Mrs. Ryan did not become candidates opposing you until October 2. From October 2 to 30 NBC states that it gave the following amounts of news coverage to the candidates in the 20th District:

Mrs. Abzug (Democrat) one minute and 20 seconds.
Mrs. Ryan (Liberal) 40 seconds.
Mrs. Levy (Republican) one minute and 48 seconds.
Mr. Michelman (Conservative) two minutes and 17 seconds.
Ms. Rosenstock (Socialist Workers Party) no time.

In telephone call made to NBC on November 1 by Commission staff, NBC also stated that Mrs. Abzug and Mrs. Ryan appeared on Newslight for approximately 27 minutes each, and that all five candidates were scheduled to appear on Direct Line on Sunday, November 5, 1972, in which each will appear approximately 12 minutes.

NBC also stated that it was its news judgment that the Conservative Party was not a major political party in the 20th Congressional District; that there are new boundaries for the 20th District in the 1972 election; that the 20th is now made up of what was basically the 19th and 20th Districts in the 1968 and 1970 elections; that in those elections the Conservative Party received the following votes: 1968—19th District, 4%; 20th District, 3%—1970—19th District 5%; 20th District 7%.

From the foregoing, it appears that Mrs. Abzug and Mrs. Ryan will have appeared approximately 40 minutes on news-type programs by

November 5, 1972 and that you will have appeared for approximately 14 minutes.

Subsequent to the receipt of above information from NBC, the Commission received a further telegram from you in which you stated that Mrs. Ryan's and Mrs. Abzug's appearances on Newslight "permit my asking for 'equal time' of provision 47 U.S.C. 315(A) not withstanding previous determination predecessor program Searchlight exempt." You further state:

> "My theory is news worthy quality of candidates Ryan and Abzug was displayed on Newslight appearances. Confined to their candidacies a newsworthy quality I share with them. Second contingent at nature of interview show appearances for half hour solo expression of attributes their own candidacies amounts to improper and unfair treatment of me contriving 'Fairness Doctrine' give licensee duty to approach spokesman opposite view meaning me and give him opportunity under substantially similar circumstances to rebut." (SIC)

You have not furnished any information which would indicate that Newslight is not a bona fide news interview program. It appears that Newslight is under control of licensee, regularly scheduled, and has same format as the program broadcast previously under title of Searchlight.

Therefore, on the basis of information available to the Commission and your failure to rebut NBC's assertions as to nature of the program, Newslight appears to be exempt from the equal opportunities provision of section 315.

NBC states that based on its independent news judgment, the major candidates in the 20th District are Mrs. Abzug and Mrs. Ryan; that in a five-candidate race news media must make their independent decisions as to who the public considers to be the major contenders in the race; that Mr. Michelman is not in the judgment of NBC a major candidate and that based on the past performance of the Conservative Party in the area comprising the 20th District, the Conservative Party is not regarded as a major party in the current election.

With respect to the Fairness Doctrine aspect of your complaint, it appears that although by November 1, 1972, your two principal opponents will have been given approximately 40 minutes of exposure on news-type programs compared to approximately 14 minutes to be given you, we cannot conclude on the basis of all of the information before us that the licensee has been unreasonable or shown bad faith, and as the Commission has often stated, it will review the judgment of licensees on Fairness Doctrine matters only for reasonableness and good faith.

In your request for Commission review you also ask "Review of findings in the matter of" your complaint against WCBS–TV. In a telegram to the Commission received October 30, 1972 you stated "demand you order WCBS–TV accord me equal time or at least fair treatment on Newsmakers program which featured my opponents Abzug and Ryan October 29, 12 noon to 12:30 P.M." In response the Broadcast Bureau stated:

> Reurtel of October 30, 1972 . . . Commission telephoned licensee's attorney who stated that program in question was bona fide news interview. Such programs are exempt from equal opportunities provision 47 U.S.C. 315(A). Therefore unless you can furnish information that program is not exempt news interview, no

further Commission action is warranted. As to your request for "fair treatment", you have not shown how the licensee failed to comply with the Fairness Doctrine.

Since you have not provided the information requested by the Broadcast Bureau no action by the Commission is warranted on this aspect of your complaint.

Accordingly, your application for review of the Broadcast Bureau ruling regarding your complaint against WNBC–TV and WCBS–TV IS DENIED.

Commissioners H. Rex Lee and Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-977

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
HON. RONALD REAGAN, GOVERNOR OF CALIFORNIA
For uniform time concerning national election results

NOVEMBER 2, 1972.

Hon. RONALD REAGAN,
Governor, State of California,
Sacramento, Calif.

This refers to your telegram received November 1 requesting that the Commission "use its good offices to get all segments of the broadcast industry together" to work out a method of refraining from broadcasting national election predictions West of the Mountain Time Zone until the polls in the Pacific Time Zone have been closed in the forthcoming election. You state that you do not intend to imply that the hard news of final results in the East should be suppressed or withheld from the West, but that you believe that "Western candidates and issues deserve the same maximum voter attention and participation enjoyed by Eastern candidates and issues"; that "we need more voters, not fewer voters," and that "nationwide predictions, broadcast before the polls close, tend to reduce the voter turnout." As you know, the Commission is prohibited by section 326 of the Communications Act of 1934, as amended, from exercising any censorship over radio communications. A number of bills have been introduced in Congress on the subject you have raised, some of which would prohibit predictions of election results before all polls are closed. Others would establish uniform polling times for Federal elections in all States and prohibit release of any results from polling places until all polls have closed. However, no such law has been enacted. The Commission's recommendations on a number of such legislative proposals were submitted to the Subcommittee on Communications, Senate Commerce Committee, by memorandum adopted February 1, 1967, a copy of which is being airmailed to you. In view of the statutory prohibition of censorship, the Commission refrains from directly or indirectly attempting to interfere in the exercise of news judgment by licensees and from intervening in the area of broadcast news presentation in any way except when extrinsic evidence of deliberate distortion or staging of news is presented. Although the Commission appreciates your suggestion it believes that it would be inappropriate for it, the Government agency responsible for granting or withholding grant of broadcast licenses, to intervene officially or unofficially in the exercise of news judgment by licensees.

Commissioners H. Rex Lee and Hooks absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-978

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
SOCIALIST WORKERS PARTY 1972
Concerning equal opportunities under section 315 Re Station WBBM-AM-TV and KMOX-TV

NOVEMBER 1, 1972.

Air Mail—Special Delivery
Mr. LARRY SEIGLE,
National Campaign Manager, Socialist Workers Party 1972, Campaign Committee, 706 Broadway, 8th floor, New York, N.Y. 10003

DEAR MR. SEIGLE: This is in reference to your telephone complaint of October 26, 1972, which alleges that KMOX-TV, St. Louis, Missouri, WBBM(AM) and WBBM-TV, Chicago, Illinois violated Section 315 of the Communications Act of 1934, by failure to provide equal opportunities to Patricia Grogan, candidate for governor of Illinois, as a result of various appearances by her Democratic and Republican opponents.

You stated that KMOX-TV broadcast appearances by Republican candidate for Governor Richard Ogilvie and Democratic candidate for Governor Daniel Walker, on August 19 and 20, 1972, respectively; that WBBM(AM) broadcast a joint appearance by Ogilvie and Walker on October 6, 1972; that WBBM-TV broadcast a joint appearance by Ogilvie and Walker on September 30, 1972; that Ms. Grogan asked for equal time within seven days of each of the first prior uses; that she furnished adequate proof of her eligibility and made a substantial showing of her bona fide candidacy to CBS, the licensee, and the three stations involved in the complaint but that the three stations refused her request for various reasons. Ms. Grogan states that she is a write-in candidate for the office of Governor of Illinois; that she is eligible to hold that office; and that her extensive speaking appearances, various other campaign activities, including the distribution of campaign literature and appearances on radio and television on behalf of her candidacy, prove that she has made a substantial showing that she is a bona fide candidate for Governor.

The Columbia Broadcasting System in its initial rejection of Ms. Grogan's request for equal time stated that Ms. Grogan's activities appeared to be more of a calendar of Young Socialist Alliance activities rather than a real schedule of campaign activities and therefore Ms. Grogan did not sustain the burden of proving that she was a bona fide candidate. CBS in later responses also alleged that Ms. Grogan is not a legally qualified candidate because she is ineligible to hold office if elected on the grounds (i) that she has failed to meet the three year residency requirement established by the Illinois Constitution as a qualification to be Governor; (ii) that the Socialist Workers Party

in Illinois is not "a political party which is commonly known and regarded as such" (Section 73.657(a) of the Commission's Rules); and (iii) that Ms. Grogan has failed to file a "statement of economic interests" required by Illinois Public Act 77–1806. Regarding its contention that Ms. Grogan has not been a resident of Illinois for three years, CBS states that Ms. Grogan ran for the office of Manhattan Councilman-at-Large in New York in the November, 1969 election and that she had a New York telephone number listed in her name in 1970.

In reply to the opposition of CBS, Ms. Grogan states that in 1969 she was a candidate for Manhattan Councilman-at-Large; that she attempted by the petition method to get on the New York City ballot; that sometime between September and October, 1969, a New York Court ruled the Socialist Workers Party off the ballot; that in early October at Columbia University she announced her withdrawal from the New York election; that in October 1969 she moved to Chicago, Illinois with the intention of remaining in that area and established residence at 1956 N. Sheffield; that she remained in Chicago from October 1969 until late December 1969 at which time she decided to resume her studies at Barnard College in New York; that she attended the second semester classes at Barnard College, where she had a New York address and telephone number, and then returned to Chicago during the summer to work at 407 S. Dearborn Street; that she returned to Barnard for the 1970 fall semester and returned to Chicago in January 1971; that while at school she kept most of her personal belongings, clothes and personal papers in Chicago, received mail in Chicago and returned to Chicago during school holidays; that she has been continuously living in Chicago since January 1971 (1956 N. Sheffield, from January 1, 1971 until October, 1971, 2021 N. Seminary from October, 1971 to October, 1972 and now resides at 2228 N. Magnolia, Chicago).

Statements supporting Ms. Grogan's contention that she has been an Illinois resident for three years were submitted by her two roommates in Chicago. The first roommate in an October 27, 1972 letter stated that:

> "She brought all her possessions (furniture, etc.) and worked there, received mail, etc. Her residency was Chicago (she did finish her schooling in New York at Columbia University) as I always received rent from her when she was at school, and she returned to Chicago as her 'home' on holidays and when school concluded at the end of the semester."

Ms. Grogan also submitted a detailed calendar of her campaign activities which included a press conference in Springfield, Illinois; campaign trips and speeches to Lake Meadows, Chicago; Cairo, Lake Forest, Rock Island, Champaign and Evanston, Illinois. Ms. Grogan alleges she distributed campaign literature at various stops around the state, handed out press releases and appeared on radio and television stations throughout the state. The Socialist Workers Party also noted it obtained 40,000 signatures in an attempt to get Ms. Grogan and other party candidates on the Illinois ballot but for various reasons were not placed on the ballot by the Secretary of State.

Section 315 of the Communications Act of 1934, as amended, states that with certain exceptions not here relevant, if a licensee permits any person who is a legally qualified candidate for any public office to use a

broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. The Commission has repeatedly stated that a legally qualified candidate must be determined by reference to the law of the state in which the election is to be held. In general, a candidate is legally qualified under Section 315 if he can be voted for in the state or district in which the election is being held, and, if elected, is eligible to serve in the office in question. See *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed. Reg. 159, Public Notice of August 7, 1970, Section IV, Question and Answer number 1. In addition, Section 73.657(a) of the Commission's Rules defines a legally qualified candidate as:

> * * * any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:
>
> (1) Has qualified for a place on the ballot or
>
> (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be.

Section 73.657(f) also provides that a "candidate requesting . . . equal opportunities of the licensee, or complaining of noncompliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office."

CBS acknowledges that the three appearances by Mr. Ogilvie and Mr. Walker were "uses" under Section 315. Thus, the remaining issue is whether Ms. Grogan is a legally qualified candidate for public office. Regarding CBS's contention that Ms. Grogan did not file a "statement of economic interests" and therefore would not be eligible to hold office, the Commission has been informed by the Illinois Secretary of State's office that if a candidate failed to file "the statements of economic interest" prior to the election and was elected, the state would allow that candidate to take office provided he submitted the statement before he assumed office.[1] Therefore, it does not appear that Ms. Grogan's failure to file "the statement of economic interests" prior to election would prevent her from being Governor if elected, provided she filed the statement prior to holding office.

CBS also argues that Ms. Grogan has not made a substantial showing she is a bona fide write-in candidate. Ms. Grogan submitted extensive material showing her campaign activities since announcing her write-in candidacy in early August 1972. We note she alleged that she traveled and spoke throughout the state; that she appeared on radio and television stations throughout the state; that she held press conferences and distributed press releases; that she passed out campaign literature; and that her party maintains a campaign headquarters and has helped to plan her campaign. It appears from the

[1] According to the Illinois Secretary of State, the gubernatorial candidates must file his "statement of economic interests" prior to June 1, before the November election date. However it should be noted that Ms. Grogan did not announce her write-in candidacy until early August 1972.

information submitted to the Commission that Ms. Grogan, after announcing that she was a write-in candidate, undertook an active campaign for that office and has made a substantial showing that she is a bona fide write-in candidate. See *In Re Complaint by Socialist Workers 1970, New York State Campaign Committee*, 26 F.C.C. 2d 244 (1970). Further, the Commission notes that while you contend the Socialist Workers Party is a political party commonly known and regarded as such in Illinois and CBS rejects your conclusion, it is not necessary to reach a conclusion on that issue in deciding this case. Section 73.657(a) states that a candidate who has not qualified for the ballot but who has announced he is a candidate and meets the qualifications of the applicable laws to hold office will be considered a legally qualified candidate if he either has been duly nominated by a political party which is commonly known and regarded as such, or makes a substantial showing that he is a bona fide candidate. Since Ms. Grogan appears to have met the latter test we need not determine whether the Socialist Workers Party is a political party commonly known and regarded as such in Illinois.

The final issue is whether Ms. Grogan meets the Illinois Constitutional qualifications to hold office. The Constitutional qualification in issue in this case is whether Ms. Grogan has been a resident of Illinois for three years prior to the election. The Illinois Constitution requires a three year residence in order to be eligible to hold the Governor's office. While CBS has presented the Commission with some evidence for questioning her residency statement, Ms. Grogan appears adequately to have explained her 1969 candidacy and withdrawal therefrom and her 1970 New York telephone number. In addition, Ms. Grogan submitted letters, address and dates of residency which appear to confirm her intention of becoming an Illinois resident in October 1969. According to the letters, most of her possessions remained in Chicago while she attended school in New York and she received mail in Chicago, paid rent in Chicago and returned to Chicago during the school's summer break. CBS asks the Commission to check Barnard residence records on Ms. Grogan and Ms. Grogan refused to allow the government to review them without the protection of a court hearing. However, CBS has not refuted any of Ms. Grogan's other statements, and it appears that from the preponderance of the available evidence Ms. Grogan has sustained the burden of proving she was a resident in Illinois for three years prior to the election. Therefore, the Commission finds that Ms. Grogan is a legally qualified candidate for Governor in Illinois and is entitled to "equal opportunities" under Section 315(a) of the Communications Act.

Commissioners Reid and Wiley dissenting; Commissioners H. Rex Lee and Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-1038

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT TO PART 15 OF THE COMMISSION'S RULES TO ACCOMMODATE A SIGNAL DISTRIBUTION SYSTEM	RM-1850

ORDER

(Adopted November 22, 1972; Released November 30, 1972)

BY THE COMMISSION:

1. A petition (RM-1850) was filed on August 30, 1971, on behalf of Ronnie Kay McEntyre and Willis A. Kerbo, doing business as McEntyre Enterprises, Oxnard, California 93030, requesting the Commission to amend Part 15 of its rules by adding a new subpart to accommodate operation of a distribution system for TV, FM and other signals.

2. The distribution system, to be used by a retail distributor of television, FM and/or communication receivers, is intended to couple TV, FM and other signals from an outdoor antenna to receivers located on a display floor wholly within the dealer's premises without the necessity of antenna leads connected to the backs of receivers. Briefly, broadcast signals are picked up by a receiving antenna, amplified by a wide band booster amplifier, distributed to coils laid on the floor, radiated, and picked up in a loop fastened to the receiver being displayed. This eliminates the need for a physical connection from the outside antenna to the receivers and allows the merchant additional flexibility in displaying the sets, provided they are positioned overtop or near a coil.

3. The petitioners contend that the distribution systems presently in use on TV showroom floors require elaborate wire installations to distribute the RF signals to display receivers, with wires laid down in the concrete floor and tap off points provided for making connections to the antenna terminals on the back of the receiver. (Not all installations may be this elaborate.) Petitioners state that this method of distributing signals is costly and claim that their system reduces the cost of installation by 50%. In addition, it is pointed out that the new system would lend itself to greater flexibility and permit the owner readily to increase or decrease the system, or change the location of the distribution system.

4. According to the petitioners, the present rules of the Commission do not permit the propagation of a usable signal from such a system. Petitioners point out that at present such a system is subject to Section 15.7 which limits the radiated signal to a level of 15 uV/m at a distance of $2/2\pi$ [1] and that this level of signal is too low to provide a satisfactory signal for display purposes. Moreover, such a stringent requirement is said not to be required when the operation is confined

[1] At the video carrier of TV channel 2 (55.25 MHz) the distance $2/2\pi$ equals 2.84 feet.

within a steel reinforced concrete building where it can be expected that radiation will not be propagated beyond the walls of the building. Petitioners do not state what the field strength should be at or near the radiating element, nor do they state what energy is required to provide for a usable system. In addition, the allegation that no radiation will go beyond the inside walls is not substantiated, e.g., by measurement data on radiation outside the building under varying conditions (i.e., varying number of elements, voltage to system, etc.).

5. Petitioners request that Part 15 be amended by adding a new Subpart, "Signal Relay Systems" to provide for a new restricted radiation device, an "Intra-structure signal relay system," designed and used for distributing RF energy by means of radiating communication signals from a strip of coils to a nearby receiver within the confines of a building. The language of the petition infers that a building (of unspecified structural characteristics) will confine the RF energy radiated by the system.

6. In addition, the petition proposes that at all frequencies, radiated signals shall be limited to a non-interfering level outside the building enclosing the system; however, no specific levels for such signals are indicated. It further proposes that the system operator (user) shall have the responsibility of compliance with the Commission's rules. With a Part 15 device such as petitioners propose, in which there appears to be a significant potential for interference, it is clear that rules dealing with such matters as signal levels must explicity state some objective standards. Petitioners' proposal provides an unsatisfactory solution for setting objective standards which would be enforceable and which would insure that the system could comply with the rules, and in so doing eliminate the possibility of harmful interference.

7. It appears that the proposed system is designed to provide economic benefits to dealers displaying TV, FM and other receivers to the general public—an activity that is being successfully carried on at present by means of wired distribution systems. At the same time, it should be noted that to demonstrate the receivers on display, the system will of necessity be radiating on TV, FM and other frequencies actually being received in the area, thus posing a high risk of interference. As to this, petitioners merely suggest that operation be on a non-interference basis and contend that the structure in which the system is housed will confine the radiated energy. However, no information is presented showing the screening effectiveness achievable by the various types of structures in which such a signal distribution system could be housed. One of the most serious problems that concerns the Commission at present is the rapidly increasing demand for radio spectrum allocations. As is indicated above, the distribution of signals for the purpose described here can be adequately accomplished by present wire systems and petitioners do not show any significant public interest benefits which would justify placing further demands on the radio spectrum for the use which they propose.

8. For the foregoing reasons, the Commission does not find that a grant of the petitioners' request would be in the public interest. IT IS ORDERED, that the above described petition of McEntyre Enterprises for rule making IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1071

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ESTABLISHMENT OF POLICIES AND PROCEDURES FOR CONSIDERATION OF APPLICATIONS TO PROVIDE SPECIALIZED COMMON CARRIER SERVICES IN THE DOMESTIC POINT-TO-POINT MICROWAVE RADIO SERVICE AND PROPOSED AMENDMENTS TO PARTS 21, 43, AND 61 OF THE COMMISSION'S RULES	Docket No. 18920 (RM-1700) (RM-2024)

FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. On June 3, 1971 the Commission released its *First Report and Order* in this proceeding (29 FCC 2d 870) resolving questions relating to the entry of new specialized common carriers, comparative consideration of competitive applications (Issue B), and proposed technical requirements (Issue C). On June 21, 1971, a *Further Notice of Inquiry and Proposed Rule Making* was released (30 FCC 2d 288) which, among other things, solicited more complete comments on local distribution (Issue E). Inasmuch as the telephone carriers had indicated a willingness to interconnect with any specialized carriers the Commission may authorize, it was requested that comments be specifically directed to MCI's proposal to allocate frequencies in the 38.6-40 GHz for local distribution (RM-1700)[1] and the possible use of other suggested regions of the spectrum (11 GHz, 18 GHz, 30 GHz, and 50 GHz).

2. Comments were filed by 18 parties: 4 equipment manufacturers (Cubic Corp., Varian Associates, Laser Link Corp. and Resalab, Inc.); 10 carriers;[2] 3 associations (Electronic Industries Association—EIA; United States Independent Telephone Association—USITA, and National Cable Television Association—NCTA); and the City of Dallas, Texas. Reply comments were filed by MCI, Datran, AT&T, the American Petroleum Institute and the Utilities Telecommunications Council.

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[1] RM-1700 and RM-2024, which involves the possible use of part of the 11 GHz band for local distribution (see paragraphs 14 and 15 below), are consolidated into this proceeding.

[2] American Telephone & Telegraph Co. (AT&T), Western Union Telegraph Co., United Video, Inc., Microwave Communications, Inc. (MCI), Comsat, Data Transmission Co. (Datran), General Telephone and Electronics (GTE), Microwave Transmission Corp., Southern Pacific Communications Co., and Interdata Communications, Inc.

THE COMMENTS RECEIVED

3. The Comments generally support allocation in the higher bands, especially in the 18 GHz (17.7–19.7 GHz) and 39 GHz (38.6–40 GHz) bands. Little active interest is currently expressed in the 27.5–29.5 GHz band, but it is seen, more or less, as the next band for development when the 18 GHz band becomes congested. The equipment manufacturers generally agree that the radio equipment for both the 18 and 39 GHz bands is within the state of the art and can be manufactured largely from existing hardware. At least two manufacturers indicate that equipment could be made available within 12 to 18 months. It is widely conceded that equipment costs, at least initially, would be somewhat higher at 18 GHz and above compared with currently used bands, but several parties believe that design trade-offs will enable the equipment to be competitive with lower band equipment.

4. Little support is found for Datran's proposed use of 11 GHz (10,700–11,700 MHz) frequencies for local distribution. Aside from Datran only United Video expresses strong support for such use, citing lack of available equipment in the higher bands, lesser reliability and greater cost. Datran does not reject 18 GHz for local distribution, but rather it proposes the higher band as an alternative or backup to 11 GHz. It prefers 11 GHz because of lower costs, longer path lengths and availability of equipment. Datran believes that its proposed use of 11 GHz for local distribution is compatible with the established frequency usage of existing carriers and will result in minimum impact on the availability of frequencies for other uses. Several other parties comment that they are not opposed to the use of 11 GHz for local distribution, but they note that such use would be limited because of congestion and possible shared use of portions of the bands for satellite purposes.[3]

5. On the other hand, the general use of 11 GHz for local distribution (other than on a temporary *ad hoc* basis) is opposed by a number of parties, among them Western Union, AT&T, USITA, Resalab, EIA and Southern Pacific. Two principal reasons cited are the potential conflict with existing 11 GHz facilities and a view that the band ought to be reserved for intercity and intracity high capacity trunks. AT&T states that it has some 5,000 existing stations which utilize 11 GHz and that the band is becoming so congested that it is difficult to terminate 11 GHz routes in some major cities. It further takes the position that the 10,000 local distribution links estimated to be required within the next few years[4] would create intolerable frequency congestion at 11 GHz. Southern Pacific, among others, contends that frequency coordination would become much more difficult; a number of local distribution systems operating in a given area would tend to establish relatively noisy background throughout the area due to reflection and scatter caused by buildings. In reply Datran contends that AT&T is attempting to reserve the 11 GHz band for its own intra-

[3] The 1971 agreement in World Administrative Radio Conference (WARC) for space specifies that bands 10.95–11.2 GHz and 11.45–11.7 GHz can be shared with the fixed-satellite service for space-to-earth transmission.

[4] Resalab estimates that 10,000 local links will be required within 6 years, while MCI states that it alone will require 10,000 links within 2 years.

city use,[5] and that Datran proposes to use 11 GHz for relatively high density backbones rather than to saturate the area.

6. There is, as previously indicated, no opposition to the allocation of the 18 GHz band; however, various views are presented concerning projected use of the band. AT&T urges that the band be reserved for high capacity, wide band digital communications. It is considering 18 GHz for high capacity intercity facilities, as a feeder for extremely high capacity intercity facilities (such as millimeter wave guide), and/or for trunking bundles of digital carrier systems within metropolitan areas. AT&T anticipates that such facilities would employ "rugged modulation techniques", such as pulse code modulation with phase shift keying (PCM–PSK) suitable for congested areas, would have digital transmission rates exceeding 100 Mb/s with capacities as high as 28,000 circuits, and would be capable of two to five mile transmission paths with 0.1 watt transmitters and 40 dB gain antennas. In contrast to the AT&T type of facilities (which would require bandwidths well in excess of 100 MHz), local distribution at 18 GHz would require much smaller capacity and narrower bandwidths. For example, Datran's system would utilize frequency pairs 20 MHz wide and employ 1 to 10 milliwatt transmitters, each channel carrying from 500 to 2000 4.8 kb/s circuits.[6]

7. Comments on the possible use of the 39 GHz band centered primarily around MCI's proposal. As set forth in RM 1700, MCI would divide the band into six channel pairs, each 90 MHz wide (the remainder of the band essentially being occupied by a 75 MHz guard band on each end and a 120 MHz center guard band). Under such plan a carrier would be authorized exclusive use of a channel pair in a given area to be subdivided and used as needed by the carrier without path by path assignment. MCI's proposal is generally supported in the comments, although there is some disagreement with regard to various technical parameters, primarily the channelizing plan. Laser Link takes the position, as do several others, that the MCI proposal leaves too much guard band. It suggests division into 12 to 14 100 MHz channels. AT&T suggests dividing the band into two half bands of 700 MHz each which would permit several combinations of two way channels, e.g. 7–100 MHz, 10–70 MHz, 14–50 MHz, etc. It favors the combination of 14–50 MHz channels. Resalab suggests 6 two way channels of 80 MHz each for common carrier use plus two channels for commercial and educational private use (with a 20 MHz guard band between each channel).

8. Several suggestions are made that frequency assignments bear some relationship to path distance. GTE proposes a minimum path length of 17 km for the 4 and 6 GHz bands, 5 km for 11 GHz and 2 km for 18 GHz and minimum loading of 600 and 300 channels. GTE contends that such plan would have meaningful relationship to the efficient use of microwave frequencies in lieu of intra and inter city designations. EIA similarly suggests a distance factor, with assign-

[5] In support it cites the applications of New York Telephone Co., File Nos. 7170/7171–C1–P–71, 882/883–C1–P–71 and 223/224–C1–MP–72, involving the use of 11 GHz for intracity trunking in New York City between Staten Island and Brooklyn.

[6] It is assumed that Datran's 18 GHz facilities would operate essentially the same as its 11 GHz system.

ments made taking into account the practical range of frequencies in each bands. It lists the suitable maximum hop (path) lengths for the 11, 18, 30, 40 and 50 GHz bands as 15, 7, 3, 3 and 2 miles, respectively. AT&T is opposed to any hop length guide. It contends that such a standard would limit its flexibility and could necessitate the use of multiple equipment on a route, thereby complicating and increasing the cost of maintaining and testing such a mixed system.

9. Several comments were received concerning the possible use of the higher bands by private users. These comments offer no details of any proposed operation but merely indicate a possible desire to use the bands once equipment becomes available. The Utilities Telecommunications Council and the American Petroleum Institute urge that only developmental authorizations be granted at this time, with technical standards and allocations between common carriers and private users being developed later. Several suggest that standards be developed through an advisory committee.

DISCUSSION

a. Local Distribution and the Lower Bands

10. In considering rules and policy for "local distribution" we note at the outset that it is difficult to define accurately what is encompassed in the term. We have used the term rather loosely to describe those facilities that would be used to connect circuits on a carrier's intercity trunk terminal with numerous customer locations or customer "clusters." While microwave radio is likely to facilitate and improve the cost effectiveness of local distribution, it will hardly be used in a way that is conceptually different from its present intercity use. The distinction between the two is one of degree. Both concern point to point two-way traffic, with local distribution generally involving lighter traffic requirements over shorter distances in metropolitan areas. However, even that generalization is not entirely accurate in view of the proposed uses contained in the comments. For instance, compare the high capacity local trunking that AT&T has in mind with the relatively low capacity cluster interconnection approach of Datran.

11. Apart from the difficulty of clearly distinguishing local distribution from other types of point to point radio facilities, it is pertinent to consider the actual need for classification. If frequency congestion was nonexistent there would perhaps be little reason to restrict the uses of the various radio bands. Each band could be used in a way that would best suit each licensee's needs most economically. However, that is not the case. Substantial, if not severe, congestion exists in the 4 and 6 GHz bands in many parts of the country, especially in and around the large metropolitan areas. Also, it is appropriate to note that the lower bands, unlike those at 18 GHz and above, are substantially superior for rendering satisfactory services over the longer distances necessary for economical intercity transmissions. Thus, it is evident that generally, with the possible exceptions noted below, the lower bands should be reserved for intercity traffic or longer trunk routes within a metropolitan area and that other short distance traffic should be transmitted at the higher frequencies.

12. In light of the foregoing, it appears to us that in the case of the lower bands (2 GHz, 4 GHz, 6 GHz, and 11 GHz) it would be more logical and reasonable to determine the appropriate frequency band to be used upon the basis of a combination of distance and loading criteria, rather than to attempt to distinguish between "intercity" and "local distribution" usage as such. Therefore, we are proposing minimum path distances for these bands as follows:

2 GHz	5 km or more.
4 GHz	17 km or more.
6 GHz	17 km or more.
11 GHz	5 km or more.

We are also proposing the following anticipated loading guidelines for these bands:

2 GHz	Less than 250–4 kHz channels or equivalent.
4 and 6 GHz	Minimum of 900–4 kHz channels or equivalent for analog systems, or 10 Mb/s for digital systems.
11 GHz	Minimum of 250–4 kHz channels or equivalent for analog systems, or 5 Mb/s for digital systems.

Applications which meet the above proposed path distance requirement and loading factor guideline for the frequency band involved will be considered regardless of whether the proposed usage is deemed to be "intercity" or a "trunk route within a metropolitan area." In essence, the various lower bands would be reserved for the use for which we believe they are best suited: the 4 and 6 GHz bands for wide band, long distance communications; the 2 GHz band (2110–2130, 2160–2180 MHz) for narrow band, medium to long distance communications; and the 11 GHz band for moderate to wide band, medium distance communications. We believe that shorter distance, narrow band requirements can be efficiently satisfied in a higher band. In order to alleviate the problem of multiple equipment types on a single route, we would allow some deviation from the minimum path length where it is shown that the use of mixed frequency bands on a given route would unreasonably complicate maintenance and operation procedures or substantially increase cost. Where the proposed channel loading projection is more than the guidelines for the 2 GHz band and less than those specified for the 4 and 6 GHz band, we would consider a request for waiver to permit use of the latter bands upon a showing that frequency congestion is unlikely in the area involved and the use of the 11 GHz would entail significant added costs.

13. The proposed anticipated loading factor guidelines for use of the lower bands reflect, for the most part, informal processing standards now being utilized and should not cause any substantial disruption to existing licensees or new applicants. As set forth in proposed Section 21.710(c) in the Appendix, the guidelines are for a projected five year period. It is contemplated that for initial licensing a good faith projection by the applicant, that is satisfactory to the Commission, would suffice. Where we are satisfied that such projection represents a good faith estimate by applicant of its future channel requirements we will dismiss any petition to deny filed by a competitor and directed solely to a challenge of applicant's projections. It is further contemplated that once frequencies have been authorized to a carrier, the guidelines will not be applicable to applications for renewal of license. In other

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words, the loading factor guidelines are designed to promote our objectives that reasonably efficient use is likely to be made of the wide band channel, to the extent practicable, and that applicants whose anticipated loading requirement is smaller than the guidelines should apply for frequencies in a band allocated for narrow band transmission.

14. In view of the increasing reliance being placed on the 11 GHz band for intercity traffic, we believe it is appropriate to attempt to maximize the use of the band. Currently, the rules specify a 50 MHz maximum bandwidth at 11 GHz. But the channel plan most widely used and that recommended by the CCIR [7] is based on 40 MHz channel spacing, while the widest bandwidth of any currently authorized equipment is 30 MHz. Accordingly, it is obvious that the use being made of the 11 GHz band is less than optimum. However, considering the current investment in operating equipment and the existing frequency plan, our ability to substantially improve utilization of the band may be limited. At minimum, though, it does appear that the maximum bandwidth should be reduced to 40 MHz to conform with the presently utilized frequency plans. Beyond that, more efficient utilization of the band may be further achieved through the development of new equipment fully utilizing a 40 MHz bandwidth, thereby occupying a full channel, or a 20 MHz bandwidth, thereby permitting the use of interstitial channels. Another interesting possibility concerns the possible interstitial use of the 10 MHz slot which occurs as the result of using 30 MHz equipment with 40 MHz channel spacing. In this regard, MCI has recently filed a petition for rule making (RM–2024) which proposes that the Commission permit this 10 MHz to be used for low power (up to 100 milliwatts), intracity local distribution. Utilizing double sideband AM equipment with .001 percent frequency stability, it would be possible, according to MCI, to realize a useable spectrum of 8600 kHz in each slot. MCI's petition is opposed by AT&T and Datran and jointly by VICOM (a manufacturing subsidiary of Continental Telephone Corp.) and Microwave Associates, largely on grounds of technical feasibility and policy. VICOM/Microwave Associates points to the development of equipment utilizing a 40 MHz bandwidth which is capable of transmitting, on a cross polarized basis, 2304 voice channels or 158 Mb/s of data.

15. On the basis of the record before us, we are unable to conclude which approach would be likely to yield a more efficient utilization of the 11 GHz band. However, in its petition, MCI has made an extensive technical analysis involving its proposal, and we believe it deserves more thorough analysis and consideration. Therefore, we solicit additional comments on the MCI proposal (see RM–2024 for details) as compared to the possible utilization of the band by equipment having a bandwidth of either 20 or 40 MHz (in lieu of 30 MHz). If the interstitial use suggested by MCI is ultimately adopted after consideration of such comments, it would not, of course, be subject to the channel loading and distance restrictions of regular 11 GHz channels.

[7] See CCIR, Volume IV, New Delhi, 1970.

b. The 18–22 GHz Bands

16. Our principal objective in allocating frequencies and developing technical standards for the use of the higher bands is to provide for and encourage a wide diversity of use under conditions which will stimulate the development of equipment that can provide service at economical costs, will adequately satisfy the high capacity needs of AT&T for its basic communications services, and will further the Commission's "objective to promote and maintain an environment within which existing and any new carriers shall have an opportunity to compete fairly and fully in the sale of specialized services" (*First Report and Order, supra*). We believe that development should proceed according to an overall plan that will accommodate those considerations without undue prejudice to the best possible long range use of these frequencies that can be foreseen. There has in the past been a tendency to underestimate the future use of a new, higher radio band and thus not plan for heavy use on an orderly basis. The details of the proposed rules to accomplish these objectives are contained in the Appendix attached hereto.[8] A discussion of the major considerations follows:

17. As noted, earlier, the comments indicate two general types of expected uses: one involving high diversity local trunking as proposed by AT&T; the other involving local distribution of relatively small circuit quantities to customer clusters as proposed by Datran. The contrast between these uses becomes obvious when the capacities and bandwidths are examined. The AT&T type use would require dividing the band into about eight two way channels (seven working and one protection), each about 200–250 MHz wide, with a total route capacity of some 28,000 voice circuits. Datran, on the other hand, would utilize channels either 0.85 or 8.5 MHz wide (not including guard band) that would be capable of transmitting 100 or 1000 4.8 kb/s data circuits. The comments indicate that there may well be other types of systems with requirements in between.

18. While these diverse requirements may not be mutually exclusive, their coexistence in the same band is likely to create problems, especially for the wide band use. While narrow band usage may occupy little spectrum space in comparison, it is likely to block the use of one or more wide band channels even if frequencies are carefully selected. The problem is compounded because both types are contemplated for metropolitan area use and because of the "scatter" configuration likely to be required for specialized carrier local distribution. It takes little analysis to appreciate the impact on the economy of operation that the loss of several channels would have on a seven working channel system. In view of this and the shared use of the band with satellite communications we do not believe it wise to mix wide and narrow band uses throughout the 18 GHz band.

19. On the other hand, if the entire 2000 MHz is reserved for high capacity, wide band digital transmission, as urged by AT&T, the

[8] Consistent with our *Notice of Proposed Rule Making* in Docket No. 19547, released July 26, 1972 (FCC 72–629), we tentatively propose that the 18 GHz band be restricted to common carrier use. However, before finalizing this restriction we will consider any comments that may be filed in this proceeding as to whether private users should also have access to this band, either on a shared basis or by allocating a portion of it for private use.

practical effect would be to deny other carriers any access to the 18 GHz band. As previously indicated, there is general support in the comments for the use of 18 GHz frequencies, as well as the 39 GHz band, for local distribution purposes. The 18 GHz frequencies are acceptable to Datran, whose preferred request for 11 GHz has been rejected. Moreover, equipment manufacturers generally agree that radio equipment for the 18 GHz band is within the state of the art and can be manufactured from existing hardware. At least two manufacturers indicate that equipment could be made available within 12 to 18 months.

20. We have considered the possibility of allocating the 18 GHz band exclusively for wide band use and the 21.2–22.0 GHz and 22.0–23.6 GHz bands exclusively for narrow band use. These latter bands (which we will refer to as the 22 GHz bands) are proposed to be made available for shared Government/non-Government use in the *Notice of Proposed Rule Making* in Docket No. 19547, released July 26, 1972 (FCC 72–629). Based on our past experience we do not anticipate any significant problem because of Government use of the bands. However, coordination would be required as is now done in other bands shared with Government users, which could be a delaying factor in the processing of applications. Moreover, while we believe the difference between the 22 GHz bands and 18 GHz band in terms of performance characteristics, the timing of equipment development is likely to be insubstantial, no opportunity has been afforded interested parties to comment on these matters as has been done with respect to 18 GHz.[9]

21. We have previously stated our "belief that established and new carriers competing in the provision of terrestrial services should not be placed in unequal positions with respect to access to frequency bands" (*First Report and Order*, 29 FCC 2d 870, 927). The Bell System, through its control of local companies, already has a dominant position in controlling access to local distribution plant required by specialized carriers proposing interstate services that may be in competition with AT&T services. Under these circumstances and to further our objective of creating an opportunity for full and fair competition in the sale of specialized services, other carriers should not be barred from access to frequency bands made available to AT&T.

22. Upon weighing all relevant considerations, we have decided to propose a frequency plan for the 18 GHz band which entails eight two-way channels, each 220 MHz wide, with a center guard band.[10] Terrestrial use of seven of these channels would be restricted to common carriers with a minimum bandwidth requirement of more than 100 MHz. The center guard band (240 MHz wide), with possible expansion into an eighth wide band channel, would be provided for use by carriers with a terrestrial bandwidth requirement of 100 MHz or less,[11] and the 22 GHz bands would be totally allocated for such narrow band use.

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[9] The 22 GHz bands were not included among the frequencies on which the Further Notice requested comments.

[10] This frequency plan contemplates the use of digital modulation techniques. Hence, it is believed that polarization discrimination would permit the transmission of two distinct signals per radio frequency channel. It is estimated that each channel on a system employing 4 phase PSK could have a maximum capacity of about 280 Mb/s.

[11] However, where the remaining wide band channels have been exhausted and no narrow band use has been made of this eighth channel, it may be utilized as a wide band channel.

Since route blockage is not likely to be a major factor for narrow band systems and in order to allow greater flexibility of use, no frequency plan is tentatively proposed for use of the narrow band portion of the 18 GHz band. However, we do propose that assignments be made on the basis of the lowest available frequency (on a split band basis for two way communications) in both the narrow band portion of the 18 GHz band and in the 22 GHz bands. Beyond that we invite comment on whether channelizing plans would be advisable, and if so, what those plans may be. We may, therefore, upon final consideration of these rules adopt channelizing plans which we may apply to all users of the 18 and 22 GHz bands. Unlike in the 18 GHz band, we do not propose to restrict use of the 22 GHz bands to common carriers (although no specific proposal for non-common carrier use is being made in this proceeding). Other technical details pertaining to the 18 and 22 GHz bands, as now proposed, are contained in the Appendix. It is appropriate to note that the 18 GHz band is shared with satellite users. Therefore, we solicit comments on the compatibility of the proposed frequency plan with satellite use of the band.

c. The 39 GHz Band

23. As noted previously the comments contain much support and no real opposition to the MCI approach on the development of the 39 GHz band, although there are suggested improvements. We are of the opinion that the block allocation concept as proposed by MCI has merit and should provide substantial benefit to both the carriers and their customers by permitting the expeditious establishment of radio channels without the delay caused by the necessity of path by path authorization. However, rather than dividing the band into 6 channel pairs, each 90 MHz wide, plus guard bands as proposed by MCI, we believe a division into narrower channels would be superior. Therefore, we propose a frequency plan consisting of 14 channel pairs, each 50 MHz wide.[12] This plan would provide more flexibility in that users with relatively small requirements would not waste part of a larger assignment (e.g. 90 or 100 MHz), but users who require more capacity could obtain two or more channels.

24. Under this proposal a carrier would be assigned a pair of channels in a given area, and he would then be permitted to subdivide the channels and transmit over any desired path in such area without further authorization. We do, however, propose to require prior notification of each use. The intended area of operation would be defined by the applicant in his application as bounded by four coordinates. Overlapping or adjacent operational areas would not be authorized for the same channel pair. Of course, we will insist that areas of operation be kept as small as possible consistent with the carrier's service responsibility. Other details are specified in the text of the proposed rules contained in the Appendix.

d. General Matters

25. On the question of frequency tolerance for 18 GHz and above we solicit comments. On one hand, a relatively tight tolerance would pro-

[12] No center or end guard bands are proposed since it is believed that they would be helpful only in limited circumstances and not justified by spectrum occupancy considerations.

mote more efficient occupancy of the spectrum and appear to be warranted due to the greater bandwidth the percentage figures represent at the higher frequencies. On the other hand, increased tolerance means greater equipment cost. It would appear that the wide band, high capacity equipment to be used in the 18 GHz band may require a somewhat tighter tolerance than may be justified in the narrow band portion of the 18 GHz band or in the 22 and 39 GHz bands, which operations are likely to be more cost sensitive because of lighter loading. Comments on this question should address the various trade-offs (e.g. cost vs. capacity vs. channel spacing) and roughly at what percentages do new design elements (e.g. automatic frequency control) become necessary. Tentatively, we have decided to extend the .03 percent tolerance now required at frequencies below 10,500 MHz to the higher bands,[13] and to also require that where allocation is made pursuant to a channel plan (i.e. in the 18 and 39 GHz bands) that carrier frequencies be maintained sufficiently within the assigned band edge so that radiation does not occur outside the channel.

26. No limitation is proposed at this time on the type of modulation to be used in the higher bands. Either analog or digital techniques may be employed, but from the comments received it appears that there is little interest in analog. Therefore, if analog is used, it should be designed to tolerate what may be described as "digital atmosphere" at 18 GHz and above. This policy would, of course, be subject to modification pursuant to any action that may be considered appropriate in connection with the proceeding in Docket No. 19311 [14] or otherwise.

27. A non-technical matter concerns the comments submitted by the City of Dallas. It requests that local governments be permitted to retain traditional rights to franchise data communications firms and assess franchise fees for operation thereof. Our previous notice did not, of course, address questions of this sort. However, it may be appropriate to briefly state at this time what the Commission believes to be the Federal interest in local distribution. Title II of the Communications Act gives the FCC exclusive jurisdiction to authorize and regulate interstate communications common carriers but leaves to the state and local governments, as appropriate, the essential authority to regulate the intrastate services of such carriers. In addition, Title III gives the FCC exclusive authority over all radio facilities (including the microwave facilities discussed herein) whether in interstate communications or not. Interstate communications, of course, includes the radio facilities for local distribution of such communications. However, where solely intrastate communications is involved, the Commission does not authorize radio facilities to a common carrier unless the applicant has any necessary state or local authorization.[15] The Commission, of course, has always recognized the legitimate local interest in the location of radio towers, underground cable ducts, overhead wire facilities and other physical plants of this sort, and it does not object to reasonable local control over these matters so long as interstate communications are not impeded or burdened in any substantial way.

[13] We also raise the question of whether the present .03 percent tolerance for the frequency range 2,450–10,500 MHz should not be substantially tightened, e.g. to .005 percent.

[14] See *Notice of Inquiry* into the digital modulation techniques in microwave radio released September 15, 1971, 31 FCC 2d 716.

[15] See Section 21.15(c) (4) of the Commission's Rules.

CONCLUSION

28. The Appendix hereto contains the details of the rules proposed.[16] Common carrier applications involving the use of the higher frequencies (18 GHz and above) may be filed but no final action, except on a developmental basis, will be taken pending the finalization of these rules. Applications for frequencies below 18 GHz for intercity use will, pending the effective date of any new rules adopted in this proceeding, continue to be considered and acted upon pursuant to existing rules and policies. However, where an applicant seeks to use these lower frequencies for other than intercity use, we will act only on those applications that are consistent with the distance and loading criteria proposed, unless it is shown that there is no other alternative and that there is a compelling need for public service.

29. Authority for this proposed rule making is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. All interested persons are invited to file written comments on these proposed rules on or before February 12, 1973, and reply comments on or before March 14, 1973. In reaching its decision in this matter the Commission may take into account any other relevant information before it in addition to the comments invited by this Notice.

30. In accordance with the provision of Section 1.419 of the Commission's rules, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

It is proposed to amend Part 21 of Chapter I of Title 47 of the Code of Federal Regulations as follows:

1. In § 21.1 add the following definition, in appropriate alphabetical order, to read as follows:

§ 21.1 Definitions

* * * * * * *

Authorized bandwidth. **The maximum width of the band of frequencies permitted to be used by a station. This is normally considered to be the necessary or occupied bandwidth, whichever is greater.**

* * * * * * *

2. In the table in § 21.101(a) opposite the frequency range 10,500 to 40,000 MHz change the frequency tolerance (percent) for "all fixed and base stations" to .03. Also, add a new footnote, keyed to the 10,500 to 40,000 MHz band in the table, to read as follows:

[4] Additionally, in this frequency range where the Commission makes assignments according to a specified channel plan, provision shall be made to prevent the emission included within the occupied bandwidth from radiating beyond the edge of the assigned channel.

[16] The text also incorporates, as appropriate, some changes necessary for consistency with the rules proposed in Docket No. 19547. It is anticipated that changes to other Part 21 rule sections affected by that proceeding will be incorporated in the rules as finalized in this proceeding.

3. In § 21.107 modify paragraph (b) to read as follows:

* * * * * * *

(b) The rated power output of a transmitter employed in these radio services shall not exceed the values shown in the following tabulation:

Frequency range (MHz):	*Rated power output (watts)*
Below 30	50
30 to 50	350
50 to 70	50
76 to 512	[1] 250
512 to 10,000	[2] 20
10,000 to 15,000	[2] 10
Above 15,000	2

[1] Transmitter rated power output is limited to a maximum of 25 watts on frequencies in the bands 454.6625–455.000 MHz and 459.6625–460.000 MHz.

[2] In the bands 5925–6425 MHz and 10,700–11,700 MHz the maximum effective radiated power of the transmitter and associated antenna of a station in the fixed service shall not exceed +55 dBW. This limitation is necessary to minimize the probability of harmful interference to reception in this band by space stations in the fixed-satellite service.

* * * * * * *

4. In § 21.701 amend paragraph (a) to read as follows (footnote text is unchanged except as specified in instruction (5): [1]

§ 21.701 Frequencies

(a) Frequencies in the following bands are available for assignment to fixed radio stations in the Point-to-Point Microwave Radio Service:

2,110 to 2,130 MHz [1 2 7]	17,700 to 19,700 MHz [5]
2,150 to 2,160 MHz [2]	21,200 to 22,000 MHz [4 9 10 11]
2,160 to 2,180 MHz [1 2]	22,000 to 23,600 MHz [4 9 10]
3,700 to 4,200 MHz [5 8]	27,500 to 29,500 MHz [4 5]
5,925 to 6,425 MHz [5 6 8]	31,000 to 31,200 MHz [4]
10,700 to 11,700 MHz [5 8 12]	38,600 to 40,000 MHz [4]
13,200 to 13,250 MHz [4]	

5. In § 21.701(a) amend footnotes 4 and 5, and add new footnotes 9, 10, 11 and 12 to read as follows:

[4] Frequencies in this band are shared with fixed and mobile stations licensed in other services.

[5] Frequencies in this band are shared with stations in the fixed-satellite service.

* * * * * * *

[9] Frequencies in this band are shared with Government stations.

[10] Assignments in this band are restricted to the lowest frequency available that will not cause interference to another station. If two way communications are involved, the return channel may utilize the lowest available frequency in the second half of the band.

[11] Frequencies in this band are shared with stations in the earth exploration satellite service.

[12] The band segments 10.95–11.2 and 11.45–11.7 GHz are shared with space stations (space to earth) in the fixed-satellite service.

* * * * * * *

6. In § 21.701 add new paragraphs (j) and (k) to read as follows:

§ 21.701 Frequencies

* * * * * * *

(j) The band 17,700–19,700 MHz is allocated for both wide band (over 100 MHz) and narrow band (100 MHz or under) uses. Assignments for wide band uses shall be made on the basis of the following frequency plan consisting of eight two-way channels, each 220 MHz wide:

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[1] The changes proposed to this section in the Notice in Docket No. 19493, released April 26, 1972 (FCC 72–360) are not incorporated in this text.

Channel group A		Channel group B	
Channel No.	Assigned frequency, polarized vertically (V) or horizontally (H)	Channel No.	Assigned frequency, polarized vertically (V) or horizontally (H)
1-A	17,810 V	1-B	18,930 V
2-A	17,810 H	2-B	18,930 H
3-A	18,030 V	3-B	19,150 V
4-A	18,030 H	4-B	19,150 H
5-A	18,250 V	5-B	19,370 V
6-A	18,250 H	6-B	18,370 H
7-A	18,470 V	7-B	19,590 V
8-A	18,470 H	8-B	19,590 H

Where narrow bandwidths are required, the lowest available frequency shall be selected in the band segment 18,580–18,700 MHz and/or 18,700–18,820 MHz. If frequencies of the desired (narrow) bandwidth cannot be accommodated in these band segments, application may be made for the lowest available frequency in the spectrum assigned to wide band channel 8A and/or 8B (i.e. 18,360–18,580 MHz or 19,480–19,700 MHz, horizontally polarized). Channels 8A and 8B may not be assigned for wide band use if any other wide band channels are available. If channels 8A and 8B are proposed for use for either wide or narrow band uses, applicant shall make a statement that no alternative frequencies of the desired bandwidth are available in the band.

(k) Assignments in the Band 38,600–40,000 MHz shall be according to the following frequency plan:

Channel group A		Channel group B	
Channel No.	Frequency band limits (MHz)	Channel No.	Frequency band limits (MHz)
1-A	38,600-38,650	1-B	39,300-39,350
2-A	38,650-38,700	2-B	39,350-39,400
3-A	38,700-38,750	3-B	39,400-39,450
4-A	38,750-38,800	4-B	39,450-39,500
5-A	38,800-38,850	5-B	39,500-39,550
6-A	38,850-38,900	6-B	39,550-39,600
7-A	38,900-38,950	7-B	39,600-39,650
8-A	38,950-39,000	8-B	39,650-39,700
9-A	39,000-39,050	9-B	39,700-39,750
10-A	39,050-39,100	10-B	39 750-39,800
11-A	39,100-39,150	11-B	39,800-39,850
12-A	39,150-39,200	12-B	39,850-39,900
13-A	39,200-39,250	13-B	39,900-39,950
14-A	39,250-39,300	14-B	39,950-40,000

These channels are assigned for use within a rectangular service area to be described in the application by the maximum and minimum latitudes and longitudes. Such service area shall be as small as practicable consistent with the local service requirements of the carrier. These frequency plans may be subdivided as desired by the licensee and used within the service area as desired without further authorization subject to the terms and conditions set forth in § 21.711.

7. In § 21.703 revise paragraph (g) to read as follows:

§ 21.703 Bandwidth and emission limitations.

* * * * * * *

(g) The maximum bandwidth authorized shall not exceed that reasonably necessary to provide the proposed service but in the following frequency bands in no event shall it exceed the limits set forth below:

Frequency band (MHz):	*Maximum authorized bandwidth (MHz)*
2,110 to 2,130	3.5
2,150 to 2,160	10.0
2,160 to 2,180	3.5
3,700 to 4,200	20.0
5,925 to 6,425	30.0
10,700 to 11,700	40.0
13,200 to 13,250	25.0
17,700 to 19,700	220.0
21,200 to 22,000	100.0
22,000 to 23,600	100.0
27,500 to 29,500	200.0
31,000 to 31,200	200.0
38,600 to 40,000	50.0

* * * * * * *

8. Add a new § 21.710 to read as follows:

§ 21.710 Limitations on path lengths and channel loading.

(a) Frequencies in the following bands shall not be used on transmission paths of less than the indicated distances.

Frequency band (MHz):	*Minimum path distances (in kilometers)*
2,110 to 2,130	5
2,160 to 2,180	5
3,700 to 4,200	17
5,925 to 6,425	17
10,700 to 11,700	5

(b) Exception to the limits in paragraph (a) may be made by the Commission when a showing (with supporting facts) is made that the use of another frequency in conformance with the rule would introduce a new type of equipment into a transmission system which would involve a substantial increase in cost or unreasonably complicated system maintenance. The distance limitation does not apply to a frequency which is power split if one transmission path of that frequency meets the minimum distance requirement.

(c) Except for video transmission, new applications for frequencies in the following bands will not be accepted for filing where the anticipated channel requirements (within a projected five year period) are less than the specified minimum per microwave channel.

Frequency band (MHz)	Minimum loading for analog systems (4 kHz channels or equivalent)	Minimum loading for digital systems (bit rate)
3,700 to 4,200	900	10 Mb/s
5,925 to 6,425	900	10 Mb/s
10,700 to 11,700	250	5 Mb/s

9. Add a new § 21.711 to read as follows:

§ 21.711 Special requirements for operation in the band 38,600–40,000 MHz.

Assigned frequency channels in the band 38,600–40,000 MHz may be subdivided and used anywhere in the authorized service area, subject to the following terms and conditions:

(a) No interference shall be caused to a previously existing station operating in another authorized service area.

(b) The Commission's Engineer in Charge of the radio district in which the intended operation is located shall be notified prior to the commencement of operation of each frequency path. Such notice shall include:

(1) The authorized call sign, transmitter station location number (assigned by the carrier in sequence of use beginning with number one) and transmitting station coordinates;

(2) Receiving station location number and coordinates;

(3) The exact frequency or frequencies to be used (which shall be considered the assigned frequency or frequencies); and

(4) Anticipated date of commencement of operation.

(c) The Engineer-in-Charge shall be notified within 10 days of the termination of any operation. The notice shall contain similar information to that contained in the notice of commencement of operation.

(d) Each operating station shall have posted a copy of the service area authorization and a copy of the notification provided to the Engineer in Charge.

(e) Twice each year, no later than January 31 and July 31, the Commission and the Engineer-in-Charge shall be provided a complete list (in tabular form) of all operations in each authorized service area (listing information as contained in the notices) current as of the previous January 1 or July 1. If no change has occurred since the previous list was filed, a statement to that effect will be satisfactory.

(f) The antenna structure height employed at any location shall not exceed the criteria set forth in § 17.7 of this chapter unless, in each instance, authorization for use of a specific maximum antenna structure for each location has been obtained from the Commission prior to erection of the antenna.

10. In § 21.801 amend paragraphs (a) and (d) as follows:

§ 21.801 Frequencies.

(a) Frequencies in the following bands are available for assignment to television pickup and television nonbroadcast pickup stations in this service:

6,425 to 6,525 MHz	21,200 to 22,000 MHz[1 2 4 5]
11,700 to 12,200 MHz[3]	22,000 to 23,600 MHz[1 2 5]
13,200 to 13,250 MHz[1]	

[1] This frequency band is shared with fixed and mobile stations licensed under Part 21 and other Parts of the Commission's Rules.
[2] This frequency band is shared with Government stations.
[3] This frequency band is shared, on a secondary basis, with stations in the broadcasting-satellite and fixed-satellite services.
[4] This frequency band is shared with stations in the earth-exploration satellite service.
[5] Assignments in this band are restricted to the lowest frequency available that will not cause interference to another station.

* * * * * * *

(d) Frequencies in the following bands are available for assignment to television STL stations in this service:

3,700 to 4,200 MHz[1 3]	13,200 to 13,250 MHz[2]
5,925 to 6,425 MHz[1 5]	21,200 to 22,000 MHz[3 4 7]
10,700 to 11,700 MHz[1 6]	22,000 to 23,600 MHz[3 4]

[1] This frequency band is shared with stations in the Point to Point Microwave Radio Service and, in United States Possessions in the Caribbean area, with stations in the International Fixed Public Radiocommunication Services.
[2] This frequency band is shared with fixed and mobile stations licensed under Part 21 and other parts of the Commission's Rules.
[3] This frequency band is shared with space stations (space to earth) in the fixed-satellite service.
[4] This frequency band is shared with Government stations.
[5] This frequency band is shared with earth stations (earth to space) in the fixed satellite services.
[6] The band segments 10.95–11.2 and 11.45–11.7 GHz are shared with space stations (space to earth) in the fixed-satellite service.
[7] This frequency band is shared with space stations (space to earth) in the earth exploration satellite service.

11. In § 21.804 amend paragraph (d) to read as follows:

§ 21.804 Bandwidth and emission limitations

* * * * * * *

(d) The maximum bandwidths will normally be authorized in this service in the following frequency bands shall not exceed the limits set forth below:

Frequency band MHz	*Maximum authorized bandwidth MHz*
3,700 to 4,200	20
5,925 to 6,575	30
10,700 to 12,200	40
13,200 to 13,250	25
22,000 to 23,600	100

* * * * * * *

F.C.C. 72-1064

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF LICENSE OF UNITED TELEVISION CO. OF NEW HAMPSHIRE FOR TELEVISION STATION WMUR, MANCHESTER, N.H.	Docket No. 19336
In Re Applications of UNITED TELEVISION CO. OF EASTERN MARYLAND, INC., FOR TELEVISION STATION WMET, BALTIMORE, MD. For Renewal of License	Docket No. 19337 File No. BRCT-635
KECC TELEVISION CORP. FOR LICENSE TO COVER CONSTRUCTION PERMIT (BPCT-3079) AS MODIFIED, AUTHORIZING A NEW TELEVISION STATION (KECC-TV) AT EL CENTRO, CALIF.	Docket No. 19338 File No. BLCT-2099

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION:

1. The above-captioned proceedings were designated for hearing in a consolidated proceeding by our Memorandum Opinion and Order, FCC 71-1112, released on November 4, 1971. Now before the Commission for consideration are pleadings filed jointly by United Television Company of New Hampshire, Inc., United Television Company of Eastern Maryland, Inc., KECC Television Corporation, United Television Company, Inc., and United Broadcasting Company, Inc.[1] requesting reconsideration of the designation order and other relief; and the pleadings responsive thereto.[2]

2. At issue in this consolidated hearing is whether Richard Eaton, who owns and controls and is the president of United Broadcasting, engaged in conduct which reflects adversely on the qualifications of the United companies to be licensees or permittees of broadcast facilities. United contends that a hearing is unnecessary since: (1) depositions taken pursuant to discovery proceedings have disposed of all unresolved factual issues and establish the absence of any misconduct on

[1] United Broadcasting Company is the parent corporation of the other companies mentioned and, as used herein, "United" refers to all of the companies.

[2] United filed a Petition for Reconsideration To Hold Proceeding In Abeyance And For Other Relief on December 6, 1971; an errata on December 7, 1971; and supplements to the petition on February 9, 1972, and March 10, 1972. The Broadcast Bureau filed responsive pleadings on December 17, 1971, February 15, 1972, and April 4, 1972. A pleading was also filed on December 14, 1971, by Washington Community Broadcasting Company which is engaged in a comparative hearing for the frequency now occupied by standard broadcast station WOOK at Washington, D.C., licensed to United Broadcasting Company. Reply pleadings were filed by United on January 17, 1972, and also on February 22, 1972. Comments were also filed by the American Broadcasting Companies, Inc. on April 28, 1972.

the part of Eaton; and (2) irrespective of the question of wrongdoing, equities exist in favor of petitioner which justify a termination of the hearing on condition that it divest itself of all of its television properties, and United is willing to accept such a condition.

3. This proceeding was initiated since information obtained in the course of the Commission's inquiry in Docket No. 18811,[3] concerning alleged practices by broadcast licensees and permittees for the purpose of influencing the grant of network affiliations, made evident the need for further exploration into the circumstances surrounding payments by Richard Eaton of substantial sums to Carmine Patti, a representative of American Broadcasting Company, Inc. (ABC), and certain changes in the affiliation agreements for WMUR–TV, WMET–TV and KECC–TV, television stations of which a United company is the licensee or permittee. United's contention that the disposition of these serious charges may be predicated solely upon the depositions of Patti and other individuals which it elected to take pursuant to prehearing discovery procedures must be rejected as totally inconsistent with sound administrative practice and with our responsibility to protect the public interest. As the Broadcast Bureau points out, United is the only party which utilized discovery procedures so that not all potential witnesses have been examined, the witnesses called were not examined on all relevant matters, and inquiry into many relevant areas was foreclosed because Patti refused to answer questions on advice of counsel.

4. In our view, United has not met these substantial objections of the Bureau. Whether the payments to Patti were made pursuant to a consultancy arrangement, as claimed by United, or for the purpose of influencing changes in the affiliation agreements of the broadcast stations, as claimed by the Bureau, cannot be resolved on the basis of the limited examination of the witnesses selected by United for prehearing depositions. We cannot permit one party to pick and choose the evidence to be considered in an adjudicatory proceeding and thereby force the opposing party or parties either to undertake prehearing discovery or run the risk of having the designated issues resolved on the basis of an incomplete record. Moreover, as demonstrated by the Bureau in its opposition pleadings, the depositions contain statements which disclose that many substantial questions remain concerning the true circumstances surrounding the changes in the affiliation agreements. Consequently, we hold here, as we have consistently held, that disputes as to material facts will not be resolved on the basis of the submissions of one of the parties, but must be predicated on a full evidentiary hearing where all parties are afforded an opportunity to adduce pertinent and material evidence, the witnesses are subjected to the test of cross-examination, and their demeanor is observed by the presiding officer. See *Telesanjuan, et al.*, 34 FCC 2d 754 (1972); *Western Connecticut Broadcasting Co.*, 30 FCC 2d 303 (1971); and *Tinker Inc.*, 2 FCC 2d 978 (1966).

5. United's request that we terminate the hearing in order to afford it an opportunity to dispose of its television properties must be denied. If United's authorizations are terminated either by revocation or

[3] See FCC 70–267, released March 16, 1970 which directed that the inquiry be undertaken.

denial of renewal it will have nothing to assign, and we have consistently held that in the absence of exceptional equities the sale of broadcasting facilities will not be authorized where the character qualifications of the seller are in question. *Gross Broadcasting Company*, 31 FCC 2d 226 (1971), reconsideration denied 32 FCC 2d 855 (1972); *Milton Broadcasting Co. et al.*, 12 FCC 2d 354 (1968). The only ground advanced by United as justification for the grant of the special relief which it has requested is the fact that it will sustain substantial financial losses if the hearing is not terminated and it is not authorized to sell its television properties. However, such losses are likely whenever a broadcasting authorization is terminated. Where the termination results from the licensee's wrongdoing, it has never been considered to be an equitable consideration which supports a request for special relief. *Capital City Communications, Inc.*, FCC 72–801, released September 20, 1972; *Milton Broadcasting Co. et al., supra.* United's reliance on *Melody Music, Inc.*, 2 FCC 2d 958 (1966), is misplaced since no comparable facts are alleged and the case clearly is inapposite.

6. Other matters raised by United require no extended comment. We reject as specious the contention that the Commission "precipitously issued a Hearing Order," because rulemaking proceedings were not first undertaken to place broadcasters on notice that the type of conduct charged herein is considered to be improper. Broadcasters may reasonably be assumed to be fully cognizant of the fact that a payment to network officers or employees for the purpose of obtaining a network affiliation or influencing the provisions of the contract is not a proper course of conduct. Rulemaking is unnecessary to bring that obvious fact to their attention. The request for clarification of that portion of our designation order which refers to the effect of a decision in this case upon other United authorizations should be submitted to the presiding judge, since that is a matter for initial determination by him.[4] Careful consideration has been given to all of United's representations, but we are not persuaded that any change is warranted in our designation order or that United merits any of the special relief which it has requested.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration and other relief filed by the United companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] In this connection, however, see *Gordon County Broadcasting Company (WCGA) v. Federal Communications Commission*, 144 U.S. App. D.C. 334, 337, 446 F.2d 1335, 1338 (1971).

F.C.C. 72R-352

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ROBERT COWAN WAGNER, PINEVILLE, LA.	Docket No. 19473 File No. BP-18463
SOUTHEAST ARKANSAS RADIO, INC., DERMOTT, ARK.	Docket No. 19474 File No. BP-18476
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 30, 1972; Released December 4, 1972)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition to enlarge issues, filed April 14, 1972, by Robert Cowan Wagner (Wagner) which requests the addition of a Rule 1.65 issue, a *Suburban* issue and engineering issues against Southeast Arkansas Radio, Inc. (Southeast).[1] [2]

RULE 1.65 ISSUE

2. Initially, Wagner requests a Rule 1.65 issue [3] to inquire into the facts and circumstances surrounding the election of Billy Calhoun as an officer and director of Southeast. In support of its request, Wagner relies on a letter to the Commission, dated September 27, 1971, in which Mr. Calhoun stated that he had been elected a vice-president of Southeast on February 26, 1969; yet, petitioner notes, Southeast's president, Bennie Ryburn, Sr., by amendment filed November 30, 1971, informed the Commission that Mr. Calhoun was elected on October 4, 1972. Petitioner next points to that portion of Southeast's by-laws which states that the corporation shall have a single vice-president and six directors and then contends that, since those positions are already filled, either Mr. Calhoun can be neither an officer nor a director, or the by-laws were changed without appropriate notice.[4]

[1] Also before the Review Board are the following related pleadings: (a) supplement to petition to enlarge issues, filed April 17, 1972, by Wagner; (b) opposition, filed May 18, 1972, by Southeast; (c) Broadcast Bureau's comments, filed May 18, 1972; and (d) reply, filed May 25, 1972, by Wagner. The Board will accept the supplement because it is only two days late, corrects an "inadvertent" error in attaching affidavits, and will not prejudice any party.

[2] Wagner also requests various issues with respect to the application of Patrick H. Robinson (Docket No. 19472, File No. BP-18320), which was also designated for hearing with the above applications. The Robinson application has since been dismissed by the Administrative Law Judge by Order, FCC 72M-682, released May 24, 1972, and therefore the requested issues are mooted.

[3] Rule 1.65 requires disclosure when the information furnished in an application is no longer substantially accurate and complete in all significant respects or when changes which may be of decisional significance have occurred.

[4] Petitioner also asserts that there is a "question" as to the corporate title of Charles H. Honey, one of the principals of Southeast listed in the by-laws as "Secy.-Treas., General Counsel," contending that it is not clear whether he is Secretary-Treasurer, General Counsel or Secretary General Counsel.

3. In opposition, Southeast initially notes that the letter dated September 27, 1971, in which Mr. Calhoun stated that he had been elected vice-president on February 26, 1969, was submitted as part of an amendment to the Southeast application on November 30, 1971. However, notes Southeast, in that same amendment is another letter from Mr. Calhoun, dated October 29, 1971, in which he explains the "misunderstanding" between himself and Mr. Ryburn, Sr., which resulted in Mr. Calhoun's assumption that he was an officer and director. According to Southeast, sometime prior to February 26, 1969, Mr. Ryburn approached Mr. Calhoun with an offer to "become a member of the group applying for the station"; that it was agreed that if Mr. Calhoun would "help out" in the Dermott area he could become a vice-president and director. Southeast states that Mr. Calhoun agreed and began participation in the prosecution of the application by keeping the local file and assisting in the community survey, among other things, and Mr. Calhoun's participation was discussed at a Directors' meeting held on February 26, 1969, with Mr. Ryburn later informing Mr. Calhoun of those discussions. As a result of these discussions and his active participation, Southeast contends, Mr. Calhoun assumed that he had been elected vice-president and director, although there was in fact, never a formal election. Finally, explains Southeast, it was not until Mr. Calhoun's September 27, 1971, letter that Mr. Ryburn realized that Calhoun assumed he had been elected, and to correct this "oversight" Mr. Calhoun was formally elected at a Directors' meeting of October 4, 1971. Southeast also refers the Board to the letter amendment from Mr. Calhoun, filed December 13, 1971, which further clarifies this matter. In reference to the number of vice-presidents and directors authorized by the by-laws, Southeast states that its by-laws have been amended to allow Mr. Calhoun to serve as vice-president and director without the necessity of removal of any of the present officers or directors. In support thereof Southeast attaches the minutes of the relevant corporate meetings. Finally, to clarify the status of Mr. Charles L. Honey, Southeast points to portions of those minutes which show that his title is now "Secretary/Treasurer" of the corporation.

4. The Broadcast Bureau supports the addition of a Rule 1.65 issue, urging that the issue is necessary because, if Mr. Calhoun was elected in February, 1969, as he has previously stated, then Southeast is guilty of failing to timely amend, while, if the present application accurately reflects the facts, Calhoun is guilty of misrepresentation. In reply, petitioner notes that while the corporate minutes included with Southeast's opposition show creation of an additional vice-presidency, they do not add a director's position, and contends that Mr. Calhoun's status in the corporation apparently cannot be determined without a full evidentiary inquiry.

5. The Review Board will deny the requested Rule 1.65 issue. Such an issue is not needed in the present circumstances because Southeast has promptly and voluntarily informed the Commission of the actual formal election of Billy Calhoun to the positions of vice-president and director. See the Southeast amendments, filed November 1, 1971 and December 13, 1971. A related misrepresentation issue is not needed because the Board finds no valid reason to question Southeast's explana-

tion of a "misunderstanding" between Mr. Ryburn and Mr. Calhoun, as detailed in their sworn statements and summarized in paragraph 3, *supra.* In this regard, the Board considers it significant that there is no showing of any motive for Southeast to conceal such facts from or mislead the Commission in this regard. *Cf. Media, Inc.*, 22 FCC 2d 486, 18 RR 2d 970 (1970); and *Auburn Publishing Company*, 34 FCC 2d 134, 24 RR 2d 29 (1972). Moreover, the additional vice-presidency and directorship has no effect on the legal, financial or other qualifications of the applicant, and therefore the Board believes no purpose would be served by further inquiry into this matter.[5] *Cf. Harvit Broadcasting Corp.*, 34 FCC 2d 586, 24 RR 2d 160 (1972).

SUBURBAN ISSUE

6. Wagner also argues that Southeast has failed to show compliance with several of the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants.*[6] Initially, petitioner notes that, although Southeast's 0.5 mv/m contour covers a "significant portion" of northern Louisiana (including the city of Monroe (population 56,374)), no persons in that State were interviewed as to either local or statewide problems. Wagner contends next that a review of Southeast's application indicates that "principals or management-level employees" were not used to conduct the survey of community leaders as required by *Primer* (Q. & A. 11(a)), and it appears that no distinction was ever drawn between the community leaders' survey and the general public survey. In this regard, Wagner also argues that the method used by Southeast to insure a "random sampling" of the general public is not stated and therefore the validity of that survey is in question.[7] Finally, petitioner attacks the substance of Southeast's demographic survey, charging that it represents nothing more than a recitation of population and sales statistics along with "canned Chamber of Commerce-type releases" and does not represent a true effort to determine the various significant groups in the area as envisioned by the *Primer.*

7. In opposition, Southeast initially argues that many of the deficiencies alleged by Wagner were pointed out by the Commission by letter, dated September 13, 1971, and in response thereto Southeast submitted its November 30, 1971 amendment which contains various surveys and other information rectifying those potential deficiencies. Thus, Southeast argues, Wagner has failed to allege any new facts which substantially question its survey. In reference to coverage of the State of Louisiana, Southeast notes that Monroe is over 75 miles from Dermott,[8] and contends that, as permitted by the *Primer*, Southeast

[5] The Board is aware of the fact that, while the by-laws were amended to create an additional vice-presidency, no such amendment relating to a directorship for Mr. Calhoun was cited. However, the Board notes that the minutes of a June 26, 1972 Directors' meeting, as contained in the Southeast application, indicate that an appropriate directorship was established. Also, the minutes supplied by Southeast adequately indicate Mr. Honey's corporate title.

[6] 27 FCC 2d 650, 21 RR 2d 1507 (1971).

[7] Wagner also argues that certain of the interview sheets attached to Southeast's application raise a question of Southeast's "candor," in that, although the sheets are signed by separate parties, they "contain printing in the identical same hand."

[8] *Primer* (Q. & A. 6) states that "no major city more than 75 miles from the transmitter site need be included in the applicant's ascertainment, even if the station's service contours exceed that distance."

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has chosen to serve a six-county area in southeast Arkansas and does not propose to serve the State of Louisiana. As for the challenge to its demographic survey Southeast urges that the information relied upon is precisely the type specified in the *Primer*. Finally, Southeast defends its survey of the general public with the assertion that the interviews were conducted by a "man-on-the-street" method, thereby insuring equal numbers of males and females, as well as adequate control over such factors as age and race.

8. The Broadcast Bureau supports addition of the requested issue, concluding that its review of Southeast's application demonstrates a failure to make any contacts in significant portions of its service area, a failure to contact representative community leaders and a failure to indicate by what method a valid cross-sampling of the general public was taken. In reply, Wagner argues that the "deficiencies" in Southeast's survey are compounded by Southeast's "admission" that it will not attempt to provide service to Louisiana. Wagner contends that an applicant cannot be allowed to "pick and choose" the outlying areas and communities it will serve or else the Commission's frequency allocation scheme is in danger. Wagner also attacks the efficacy of a "man-on-the-street" type interview, arguing that such a method cannot provide the required random sampling. Finally, Wagner reasserts its contention that the demographic data supplied by Southeast does not meet the *Primer* requirements in that, for example, Southeast has set forth no groups in the area and therefore it must follow that any survey of community leaders will be inaccurate.

9. Although Southeast has by amendment and in its responsive pleading adequately answered several of the questions raised by the petitioner, *i.e.*, whether Southeast failed to survey a significant portion of its proposed service area,[9] whether it utilized principals or management-level employees to conduct the survey, and whether a distinction was drawn between surveys of the general public and community leaders, the Board nevertheless is of the view that the addition of a *Suburban* issue is warranted. The primary reason for our determination is the apparent failure of Southeast's demographic survey to provide an adequate showing of the composition of the community as required by the *Primer*, (Q. & A. 10). The purpose of such a showing is, of course, to inform the applicant and the Commission as to what groups comprise the community and yet, as noted by petitioner, nowhere in Southeast's application is there any indication of what groups are present or their location. Just as important, Southeast "has not shown that it prepared an adequate summary of the applicable data or that its determination is based on anything more than generalities and estimates." In sum, Southeast "has simply supplied no concrete information on which a determination of the composition of the community can be based," *WPIX, Inc.*, 34 FCC 2d 419, 421, 24 RR 2d 59, 62 (1972), and addition of the issue is necessitated. Moreover, the Board is concerned with the "random sample" survey of the general public. As noted in the *Primer*, (Q. & A. 13(b)), random sample consultations with the general public "should be designed to further ascertain com-

[9] In this regard, we note that the only major community which petitioner specifically alleges is located in the unsurveyed area is Monroe, Louisiana, which is located more than 75 miles from Dermott.

munity problems which may not have been revealed by consultations with community leaders." In view of the apparent failure of Southeast's demographic survey to adequately locate the various groups and, in turn, the leaders thereof, the possible failure of the "man-on-the-street" survey to provide a truly random sampling of the general public assumes even greater significance.[10]

TECHNICAL ISSUES

10. Wagner's final requested issues seek a determination of whether the signal placed over Dermott, Southeast's proposed city of license "represents good engineering practice in the light of the normally expected variations in signal strength occurring in the null areas of its directional antenna pattern", and whether the antenna site proposed by Southeast is the best site to provide the maximum signal strength over Dermott.[11] Petitioner relies on the case of *Edina Corp.*, 27 FR 7692, published August 3, 1962, where a similar issue was added and also submits the affidavit of its engineer in which he avers that the Southeast proposal does not represent "good engineering practice" because of a diminution of signal strength over Dermott which might fail to provide the required coverage.

11. The Review Board will deny the requested issues. As pointed out in the responsive pleadings of both the Broadcast Bureau and Southeast, the allegations in support of these issues are conclusory in nature and are not supported by concrete charges of technical deficiencies sufficient to support the action requested. Rule 1.229(c). In its responsive pleading, Southeast has adequately shown that its proposal complies with the coverage provisions of Commission Rules 73.-188(b)(1) and (2), which distinguishes the instant proposal from that in *Edina*, *supra*, where the Commission had previously specified such a coverage issue. Finally, in reference to Southeast's antenna site, the Board notes that Attachment 1 to Wagner's petition to enlarge, which depicts the interference situation between Southeast and WKRA, establishes that any site selected further east from that presently proposed would result in increased interference from Station WKRA.

12. Accordingly, IT IS ORDERED, That the supplement to petition to enlarge issues, filed April 17, 1972, by Robert Cowan Wagner, IS ACCEPTED; and that the petition to enlarge issues, filed April 14, 1972, by Robert Cowan Wagner, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

13. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine the efforts made by Southeast Arkansas Radio, Inc. to ascertain the community needs and interests of the area to be served and the means by which it proposes to meet those needs and interests; and

[10] Although the petitioner, in a footnote, contends that the handwriting on various sheets submitted by different Southeast interviewers is similar, and suggests that this raises questions of candor, petitioner concedes that it is speculating, and its unsupported allegations in this regard are clearly insufficient to warrant a separate candor issue.

[11] In this regard, Wagner argues that Southeast should make a showing as to why its antenna site could not be moved further east, thereby stabilizing its signal over Dermott.

14. IT IS FURTHER ORDERED, That the burdens of proceeding with the introduction of evidence and proof under this issue SHALL BE upon Southeast Arkansas Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1057

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WALTER E. WEBSTER, Jr., RECEIVER, ASSIGNOR, AND STERLING THEATRES CO., ASSIGNEE For assignment of licenses of Stations KTW, AM and FM, Seattle, Wash.	BAL-7494 and BALH-1618

NOVEMBER 22, 1972.

Air Mail
Mr. WALTER E. WEBSTER, Jr.,
Receiver, 1505 Northern Life Tower, Seattle, Wash. 98101
Mr. FREDERIC A. DANZ,
Sterling Theatres Co., 975 John Street, Seattle, Wash. 98109
Mr. and Mrs. NORWOOD J. PATTERSON,
Suite 3005, 666 East Ocean Boulevard, Long Beach, Calif. 90802
Mr. S. H. PATTERSON,
% Norwood J. Patterson, Suite 3005, 666 Ocean Boulevard, Long Beach, Calif. 90802

GENTLEMEN: This refers to the applications for assignment of the licenses of Stations KTW, AM & FM, Seattle, Washington, from Walter E. Webster, Jr., Receiver to Sterling Theatres Company (BAL-7494 and BALH-1618).

As you are aware, on October 19, 1972, the Commission requested the applicants and Nordawn and its principals to comment on the issue of what effect, if any, a decision by the U.S. Court of Appeals for the Ninth Circuit reversing the Federal District Court's dismissal of Nordawn *et al.'s* Motion for a Chapter X Reorganization would have on Mr. Webster's authority as Receiver, and whether such a decision would require removal of Mr. Webster and vacating the Order on which the State receivership is based.

We have carefully considered the responses, and we have concluded the overall public interest would best be served by deferring action on the assignment applications until the Ninth Circuit Court of Appeals has rendered a decision in the pending appeal by Nordawn *et al.*[1]

The comments of Sterling and the Receiver suggest a favorable decision on Nordawn's appeal would not—at least automatically—re-

[1] We note that on November 6, 1972, Nordawn filed an alleged Loan Agreement between Nordawn and certain of its principals and the Mercantile Financial Corporation, for $800,000. Nordawn notes that since this loan might bring an end to the litigation which led to the Receivership, including the pending Ninth Circuit appeal, this affords an additional basis for deferring action. Our decision here is not based on this purported loan agreement. The copy of the agreement filed with us is unsigned, extensively conditioned, and involves considerations which should not be interjected into this assignment proceeding. Moreover, on November 10, 1972, a Nordawn creditor notified the Commission he had no intention of settling his $337,000 claim against Nordawn for $250,000. Settlement on this basis is a material condition of the loan.

quire removal of Mr. Webster and termination of the State receivership. The opinions of their counsel are based on technical concepts of the finality of judgments, principles of mootness, the effect to be given Nordawn's failure to request an injunction against sale of the stations, and a State receiver's duty to make an accounting and to deliver assets to a Federal Trustee in the event it is determined the Federal Bankruptcy Laws apply. Nordawn, on the other hand, contends reversal of the District Court would require removal of Mr. Webster, and delivery of assets over to a Federal Trustee.

We are not in a position to resolve these conflicting claims. But in view of the uncertainties involved, we believe the public interest would best be served by preserving the *status quo* until the Ninth Circuit Court of Appeals renders its decision.

In view of the importance of obtaining an early decision, Nordawn and the Receiver are urged to use their best efforts to bring to the Court's attention the desirability of scheduling oral argument at the earliest time possible. Nordawn and the Receiver are further directed to advise the Commission within thirty (30) days of the date of this letter as to what steps they have taken to bring this matter to the Court's attention.

The applicants were further requested to indicate whether they contemplated an extension of the contract. The responses indicate that if necessary, the applicants will ask the Court to authorize an extension. In this connection, the applicants should be apprised that the Commission has considered the merits of the application and the various petitions and objections filed herein. On the basis of this consideration, the Commission has concluded there are at least three substantial and material issues of fact which would require a hearing before the applications could be granted. Those issues involve (a) the *bona fides* of Sterling's survey and decision to change the format, in view of Mr. Casey's statements at the September 30, 1971 hearing before Judge Chan, and whether misrepresentations involving this matter were made in Sterling's Opposition to Nordawn's petition, (b) whether the linkage between Sterling's ascertained community needs and proposed programming complies with Primer requirements, and (c) whether Sterling's proposals to similcast KTW programs over KTW–FM violate Section 73.242 of the Rules by exceeding the 50% limit prescribed therein. No final determination has been made as to whether further issues (e.g., the allegations respecting undue regional concentration) need to be explored in hearing.

Commissioner Wiley not participating.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-968

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaints Concerning
WFIL, INC., LICENSEE OF STATION WAND-TV, DECATUR, ILL.
Re program sponsored by the Baca Grande Corp.

NOVEMBER 1, 1972.

WFIL, INC.,
Licensee of Station WAND-TV,
Post Office Box 631,
Decatur, Ill. 62525

GENTLEMEN: This is in reference to the Commission's letter of inquiry dated July 11, 1972, and to your response thereto dated August 17, 1972, concerning the broadcast by WAND-TV of a program sponsored by the Baca Grande Corporation.

As you recall, the Commission's inquiry was occasioned by viewer complaints that the Baca Grande Corporation's program concerning its real estate development in Colorado was wholly commercial in nature. Our inquiry particularly directed your attention to the Commission's letter of March 11, 1970 to *Columbus Broadcasting Company, Inc.* (25 FCC 2d 56) which dealt with program-length commercials in the context of logging requirements and the public interest standard of licensee performance.

In response to the Commission's inquiry, you stated that the program consisted of a film focusing on the Baca Grande area of Colorado and the real estate development itself, "interspersed" with "locally-produced segments discussing the properties and their availability, and inviting interested persons to obtain more information about the possibilities of purchase." The exhibits which you have submitted show that the program was broadcast a total of 18 times and that the broadcasts averaged 27 minutes in length, depending on the duration of the locally-produced continuity.

You also stated that after receiving a copy of the complaint which prompted this inquiry, you "fully reviewed the program, and decided to cease broadcasting it," believing that it was "very similar to the programs sponsored by the General Development Corporation which were the subject of the Commission's letter in the *Columbus Broadcasting Co.* case." You stated further that there were "logging errors made in the case of each broadcast" and that your logs "have now been corrected to show that the entire length of the program was in each case commercial time." In this regard, you stated that you "recognize that each hour in which the program appeared will now reflect commercial minutes in excess of the station's stated hourly maximums."

In mitigation, your response stated the following: that Station WAND–TV has had a standing policy against program-length commercials; that your Program Director, in accepting the film for broadcast, "lacked sufficient sensitivity to the program-length commercial aspects of the broadcast and concluded that the viewing public would benefit from learning of successful efforts to create living situations in harmony with the beauties of nature"; that applicable memoranda and advice of WAND–TV counsel failed to come to the attention of the station's management due to internal reorganization and personnel changes; and that you have subsequently taken steps to prevent recurrence of such programming, including dissemination of memoranda concerning pertinent Commission policy to appropriate managers and other personnel and procedures for program review.

In the *Columbus* case, the Commission dealt with a program-length film on real estate development in Port Malabar, Florida sponsored by General Development Corporation. The film consisted of explicit commercial material promoting viewer investment in the Port Malabar development together with a tourist narrative of points of interest in the general area. We there rejected the contention that the film was designed to entertain or inform and ruled that the entire program was commercial in both design and effect and was required to be logged accordingly.

Our review of the script of the program here in question discloses that the Baca Grande presentation is virtually indistinguishable from the "Port Malabar" film. Interwoven with a narrative of the area's history and geography is a continuous commercial message designed to promote investment in the Baca Grande development. The following excerpt is typical in this regard:

Narrator: You're not very far from other things either. You've got the whole state of Colorado within easy reach. Just down the valley is Alamosa, Colorado. It's so close, that at night you can see its lights from your chalet, but it's too far away to ever destroy your view, no matter how big it grows. Adams State College is here, and Alamosa is where Linda and I go to church every Sunday morning.

Sometimes a tourist attraction can mean a great deal more than just a place to go. It can mean real protection for you. Both the Rio Grande National Forest and the Great Sand Dunes National Monument surround the Baca Grande. Because of these national lands, no other communities can crowd the Baca Grande. It will be the only one here with this view and protection; and as the number of sites gets smaller, the demand goes up * * * your property will be worth more. The law of supply and demand.

This film and narration are interrupted once and closed with studio dialogue and promotional message of which the following is indicative:

Live in studio: "We've shown the Baca Grande several times, Merle. How's the response been?"

"Well, Mike, it's just been great. * * * I think it just exemplifies the appeal that most people have to this type of concept, the Baca Grande concept."

"I can see why. How about remaining properties? You can't make any more land. What's left at this point?"

"Of course, property has been moving very, very well and I feel this way—that just about anything on the Baca Grande is great property, but let's face it; there has to be some better than others. The longer folks keep putting off looking into it, the smaller the selection, and at the same time, the higher the price."

"Why not call right now—[Phone number]; call collect. You'll get full information on this one of a kind property."

We note that subsequent to our inquiry you recognized the commercial nature of the Baca Grande program and corrected your logging entries accordingly; however, our difficulties with such commercial programming go beyond issues of logging requirements. As the Commission stated in *KCOP–TV, Inc.* ("100 Paintings" and "Great Moments in Music"), 24 FCC 2d 149 (1970):

> We have dealt only with the question of the amount of commercial time to be logged, but there is a more important question in all of these cases. That question is whether there is a pattern exhibited by the licensee which may "subordinate programming in the interest of the public to programming in the interest of saleability." As we have made clear, a pattern of presenting program-length commercials or programs with respect to which other factors indicate that the licensee is disregarding the interest of the public in its programming will be considered as raising questions as to whether the licensee is operating in the public interest. *Id.* at 151.

In this regard, we note that before our inquiry prompted your review of the Baca Grande presentation, Station WAND–TV had broadcast the program 18 times over an eight-month period from October 24, 1971 to June 25, 1972 for a total of more than eight hours of broadcast time. Furthermore, as you admit, the number of commercial minutes in each hour in which the program was broadcast exceeded the hourly maximums stated in your application for license. In our opinion, this performance may represent a pattern of "subordinating programming in the interest of the public to programming in the interest of saleability" and raises questions as to whether you have been operating Station WAND–TV in the public interest. See *Letter to American Broadcasting Company*, 21 FCC 2d 148 (1969). Noting that your present license expires December 1, 1973, we are directing that all correspondence in this matter be associated with the file for Station WAND–TV and considered in conjunction with any application for renewal of that license.

Finally, while we note your statements in mitigation, we find that such submissions are insufficient to excuse your responsibility for these violations of Commission rule and policy. Licensees are expected to be familiar with Commission rules and policies and to adhere thereto, and the Commission has repeatedly held that licensees are responsible for the acts of station management and employees. See *In re Applications of Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962); *In the Matter of Glen Harmon Corporation*, 1 FCC 2d 1478 (1964). In this regard, we note that the Commission's ruling in the "Port Malabar" case was handed down over a year prior to your broadcast of the Baca Grande program. Similarly, the fact that corrective action was taken and that the station has been operating in accordance with the rules since the violations were pointed out will not excuse prior violations. See *In the Matter of Liability of Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966).

In view of the fact that you state that you have ceased broadcasting the program and have corrected your program logs to reflect that the entire program was commercial time, no further Commission action is contemplated on the matter at this time. However, it will be considered in connection with your next application for renewal of the license of

WAND–TV, together with all other information before the Commission at that time regarding your overall performance during the past license period.

Commissioner Johnson dissented; Commissioners H. Rex Lee and Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-1084

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WFMY TELEVISION CORP. (WFMY-TV), GREENSBORO, N.C. For Renewal of Broadcast License	File No. BRCT-69
GREENSBORO TELEVISION CO., GREENSBORO, N.C. For Construction Permit for New Television Broadcast Station	File No. BPCT-4303

ORDER

(Adopted November 29, 1972; Released December 4, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration a "Motion For Stay Pending Appeal," filed October 25, 1972, by Greensboro Television Company (Greensboro), of our decision in *WFMY Television Corp.*, 25 RR 2d 365, —— FCC 2d ——, released September 26, 1972, in which we affirmed our action in *WFMY Television Corp.*, 33 FCC 2d 857, 23 RR 2d 1032, released March 2, 1972, denying a "Joint Petition for Approval of Agreement," filed by WFMY Television Corp. and Greensboro.

2. In denying approval of the withdrawal agreement, we stated that prior to our designating the competing applications of Greensboro and WFMY for comparative hearing, we would require Greensboro to file a statement, within thirty days of the release of our Order, as to whether it intended to participate in further proceedings before the Commission. Furthermore, we provided in paragraph 6 of our Order of September 26, 1972, that if Greensboro did not file a statement within the time period specified, indicating its intention to participate in further proceedings, its application would be dismissed for failure to prosecute, pursuant to section 1.568(b) of our rules. In its motion for stay, Greensboro states that it has filed an appeal in the United States Court of Appeals for the District of Columbia Circuit of our September 26, 1972, decision. Greensboro requests that the final date specified in paragraph 6 of our September 26, 1972, Order be stayed and that Greensboro be given thirty days from the release of the final opinion of the United States Court of Appeals for the District of Columbia Circuit concerning Greensboro's appeal, in which to make the determination required by paragraph 6 of our Order. We will grant Greensboro's motion for stay since to do so will not result in any harm to the public interest and not to do so will result in irreparable

injury to Greensboro because it would deprive Greensboro of the opportunity to prosecute its application through a comparative hearing.

3. Accordingly, IT IS ORDERED, That the motion for stay, filed October 25, 1972, by Greensboro Television Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*